Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF CALIFORNIA,

Petitioner,

v.

KWASI OPUKU-BOATENG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a 2-1 decision by Judge Reinhardt, the Ninth Circuit held under Title VII of the Civil Rights Act that petitioner, the State of California must hire respondent, a Seventh Day Adventist who refuses to work on his Saturday Sabbath, as a plant quarantine inspector at a border inspection station even though hiring respondent would adversely affect the work schedules, vacations, and time off of the nine other rank-and-file plant inspectors who would have to work respondent's Saturday Sabbath shifts, and even though giving respondent a preferential work schedule would undermine the State's policies requiring unpredictable and rotating work shifts at border stations. The questions presented are:

1. Whether the Ninth Circuit failed to follow this Court's "undue hardship" standards in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) which limit the extent of religious accommodation required under Title VII of the Civil Rights Act of 1964; and,

2. Whether the religious accommodation required by the Ninth Circuit in this case violates the Establishment Clause and the Tenth Amendment of the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner, who was a defendant below, is the State of California. Other individual State officials who were originally named as defendants were dismissed as parties in the district court.

Respondent, who was the plaintiff below, is Kwasi Opuku-Boateng, an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of California ("The State"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, per Judge Reinhardt, is reported at 95 F.3d 1461 (9th Cir. 1996), and reprinted in the Appendix ("App.") at 1-31. Judge King, sitting by designation, dissented from the Ninth Circuit opinion, and the dissent is reprinted at App. 31. The opinion of the U.S. District Court for the Eastern District of California is unreported and reprinted at App. 32-73.

JURISDICTION

The opinion and judgment of the Ninth Circuit was filed on September 19, 1996. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Ninth Circuit on November 15, 1996. App. 74. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e(j), defines "religion" in pertinent part as:

> "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonable accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"

Section 703(a)(1) of Title VII, 42 U.S.C. section 2000e-2(a)(1), makes it an unlawful employment practice to discriminate against an individual "because of such individual's . . . religion."

The Establishment Clause of the First Amendment of the U.S. Constitution provides that: "Congress shall make no law respecting an establishment of religion."

The Tenth Amendment of the U.S. Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

1. The State refused to hire respondent as a plant quarantine inspector in the California Department of Food and Agriculture ("CDFA") because the job requires one to work rotating shifts 24 hours a day throughout the week and on weekends, and respondent was unwilling to work on his Saturday Sabbath. Respondent sued, alleging that the State's failure to accommodate his Sabbath observance constituted religious discrimination in violation of Title VII of the Civil Rights Act of 1964. The district court

ruled that accommodating respondent's Sabbath observance would impose "undue hardship" upon respondent's co-workers and the State within the meaning of Title VII. Consequently, the district court held that the State's refusal to hire respondent was not religious discrimination. The Ninth Circuit, with one judge dissenting, reversed, and held that the burdens on co-workers and the State did not constitute "undue hardship", and that respondent was consequently discriminated against because of his religion. The dissenting Ninth Circuit judge would have affirmed the district court's decision.

2. The Ninth Circuit in this case has turned religious accommodation under Title VII on its head. The "undue hardship" standards in Title VII limit the extent to which an employer must accommodate the religious practices of an employee. When those limits are exceeded and when religious accommodation imposes "undue hardship" on other co-workers and the employer, then Title VII becomes a cause of preferential treatment (or discrimination) on religious grounds, rather than a remedy for discrimination, contrary to the purpose and objective of Title VII.

Giving respondent time off for his Saturday Sabbath observance would significantly burden the nine other rank-and-file plant inspectors at his assigned border station because those co-workers would have to: (1) work respondent's Friday night and Saturday shifts (which they preferred to have off); (2) forego some four day breaks, uninterrupted breaks, and simultaneous vacations because of the special scheduling of respondent's shifts; (3) provide cover for other sick employees and be available for emergency duty during respondent's Sabbath

when he would not; and (4) accept transfers to smaller border stations, should the need arise, when respondent would not because of the inability to accommodate respondent's Sabbath observance at a smaller station.

Accommodating respondent's Sabbath also would significantly burden the State by: (1) requiring the State to either incur added costs of replacement workers to fill in for respondent on his Sabbath, or work with a reduced work force during respondent's Sabbath, one of the busiest work days; (2) reducing the manpower available for cover or emergency assignment during respondent's Sabbath, and for temporary reassignment to smaller border stations; (3) undermining the state policy of having unpredictable shift schedules to minimize collusion between inspectors and shippers, and (4) undermining the state policy of having inspectors work all shifts throughout the week and weekend to gain experience and training in the different commodity and shipper traffic which occurs at different times of the week.

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) – which also involved religious accommodation of a Saturday Sabbatarian – sets forth standards for "undue hardship" in Title VII. The Ninth Circuit's decision in this case conflicts with *Trans World Airlines, Inc. v. Hardison*, and goes far beyond the "undue hardship" standard in Title VII. The Ninth Circuit's decision is also inconsistent with other decisions that hold that an employer who operates a workplace twenty-four hours a day or on weekends, and who has a neutral rotating shift system – like that in this case – need not grant special shifts to a Saturday Sabbatarian. See *Beadle v. City of Tampa*, 42 F.3d 633, 635-637 (11th Cir.), *cert. denied*, 115 S.Ct. 2600 (1995); *Beadle v. Hillsborough County Sheriff's Department*, 29 F.3d

589, 592 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 2001 (1995); *Wisner v. Truck Central, A Subsidiary of Saunders Leasing*, 784 F.2d 1571, 1572-1574 (11th Cir. 1986); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 144-147 (5th Cir. 1982); *United States v. City of Albuquerque*, 545 F.2d 110, 113-115 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977).

The Ninth Circuit's error in this case is significant because of the danger that excessive religious accommodation may provoke religious divisions within the workplace. The evidence in this case showed that when a Protestant plant quarantine inspector at the Truckee station was granted special shifts to accommodate his Sunday religious observance, it led to formal grievances by other Catholic inspectors who wanted similar preferential shift schedules. The resulting requests for religious accommodation had threatened CDFA's ability to staff the Truckee station on Sundays. See App. 75-78. An informal poll of respondent's co-workers showed that none of them were willing to voluntarily trade shifts to accommodate respondent's Sabbath on a permanent or long-term basis. *Infra*, at 8. The one co-worker to testify on the subject thought it unfair for respondent to have special shifts and time off for his Sabbath observance when other workers did not. *Infra*, at 12. In light of this evidence, the Ninth Circuit's decision threatens to bring into the State's work force an age-old evil: religious divisiveness borne of the belief that the government favors one religious group over another.

The Ninth Circuit also has required the State to drastically rearrange its neutral, merit-based civil service and work organizational methods to accommodate respondent's religious practices. The Ninth Circuit's decision requires the State to hire respondent as a temporary plant

quarantine inspector, and then transfer him to some other civil service job in State employment if he cannot be accommodated as a plant inspector even though civil service examinations are required for different State jobs, and even though respondent has passed only the civil service exam for the plant inspector position. The Ninth Circuit's opinion also requires the State to change its method for scheduling plant inspector shifts by dropping the month-to-month scheduling currently used, and scheduling shifts six months to a year in advance (purportedly to facilitate respondent's ability to trade shifts with other workers).

The workplace in this case is a quasi-law enforcement one. Plant inspectors work at inspection stations along California's border, and inspect vehicles entering the State for quarantined and pest-infested matter. Major border stations, like the one to which respondent was assigned, operate twenty-four hours a day, seven days a week, which is why the small work force of inspectors must share rotating shifts throughout the week and on weekends. If the Ninth Circuit's erroneous standard of religious accommodation remains uncorrected, then virtually every other governmental employer, no matter how small, which operates twenty-four hours a day, and which provides an essential public service – like police, firefighters, Highway Patrol, public hospitals, etc. – must also provide preferential shift schedules based on religious criteria. The State seeks review because it believes that *Trans World Airlines, Inc. v. Hardison, supra*, the Establishment Clause, and the Tenth Amendment bar this result.

Statement of Facts

Respondent is a Seventh Day Adventist who refrains from work, and observes the Sabbath, from sundown Friday to sundown Saturday (hereinafter "Saturday Sabbath"). RT 83-84.[1] Respondent has never worked on his Saturday Sabbath, and refuses to do so under any circumstances. RT 85, 98, 170-171, 176, 220-221, 302. In 1982, respondent applied for a position with the CDFA as a plant inspector at a border inspection station. Major border inspection stations are open continuously, twenty-four hours a day, seven days a week, RT 540, 591-592, 927-928. Plant inspectors consequently share rotating shifts to cover the continuous operation of a border station. RT 540, 591-592, 1028, 1114.

After respondent passed a civil service examination for the plant inspector position, he was notified to report for work at the Yermo border station. RT 98-100; ER 15-16, ¶11, 47. The Yermo station is open continuously 24 hours a day, RT 401, and in 1982 had a total of five supervisors and ten rank-and-file inspectors. App. 37. Although both the civil service job announcement and exam bulletin specified that the plant inspector position required a willingness to work "Sundays, holidays and odd hours", RT 80, 1111-1114, respondent did not inform CDFA of his unavailability for work during his Sabbath. RT 304-307.

When respondent appeared at the Yermo station, he learned that he was scheduled to work on a Saturday

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[1] "RT" refers to the Reporter's Transcript of the trial in this case. "ER" refers to the Excerpt of Record filed in the Ninth Circuit.

later in the month. He informed the station supervisor that he was unable to work on his Saturday Sabbath. RT 102-111; ER 16, ¶14.

Respondent's appointment papers were then held in abeyance while CDFA officials and respondent's representatives tried to find some acceptable accommodation. RT 235-237, 970-980, 1006-1007, 1078. At some point during this process, the Yermo staff was informally polled to see if other plant inspectors were willing to trade shifts to accommodate respondent's Sabbath observance. RT 444-447, 536-537, 987-998, 1037-1038. While one or two employees were willing to make occasional trades, none were willing to trade shifts with respondent on a regular or permanent basis. RT 1004, 462. After the attempt at accommodation failed, respondent was not hired as a plant inspector because of his refusal to work during his Saturday Sabbath. ER 52.

Respondent then commenced this action in the district court seeking back pay and benefits dating from November 1982. The case was tried eleven years later in 1993. The evidence established that most employees preferred not to work on Saturdays because they had families and wanted time off when their families were also free. RT 441, 476-477, 501. Employees also kept track of the shifts they worked, and would complain if they perceived an unfair allocation of weekend and weekday shifts. RT 478-479, 502, 544-545, 607-608, 885, 957-959.

There were four main criteria that were used to schedule shifts. First, everyone had to assume an equal number of weekend and weekday, night and day, and holiday shifts. RT 601-606, 930, 1053-1054, 1105-1106. Second, shifts were scheduled to give employees four day

breaks (consisting of two back-to-back two day periods off) because border stations are in remote locations, and four day breaks allowed employees to travel to urban areas for shopping, recreation, and entertainment. RT 428, 1139-1140. Third, because vehicular traffic entering the State is heaviest on weekends, a full complement of inspectors was needed on weekends. RT 422-423, 548-549, 578, 1140; ER 48. Finally, the federal Fair Labor Standards Act ("FLSA") requirements, which became applicable after 1982, require two consecutive days off every forty hour work week, and overtime pay for any shift over eight hours. RT 425-429. Schedules had to be drawn up to comply with FLSA requirements and avoid the need for overtime pay.

There was undisputed testimony that giving respondent a fixed twenty-four hour period off on Friday and Saturday every week for his Sabbath would not only require other inspectors to work more Friday night and Saturday shifts, RT 1018, but would also reduce the ability to give other inspectors 4 day periods off, split some of their days off, restrict the number of people who could take vacation simultaneously, and limit the ability to temporarily accommodate leave requests of other employees. RT 641-642, 1149-1151, 1224, 1228-1230.

There is no temporary pool of inspectors who can fill in if respondent receives every Saturday Sabbath period off. RT 408, 450-451, 593-595, 617. Even if inspectors are not scheduled to work a shift, they still may be called back to work to cover for another inspector who may be ill or may have some other emergency. RT 449-450, 611, 630, 632, 1026-1027. Inspectors also may be called at any time, and have been called, during emergencies, like the medfly emergency or the apple maggot infestation, RT

543, 555, 592-593, 947-948. If respondent was unavailable to work on Friday and Saturday (when a full complement of workers was most needed), he could not provide cover for other sick employees, nor would he be available for emergency duty at those times like every other inspector. RT 1233-1234.

If a border inspection station is shorthanded, traffic seeking to enter the State either backs up – which results in complaints from the Highway Patrol and the California Department of Transportation about the resulting traffic hazard, RT 615, 944-945 – or traffic has to be allowed through without inspection – which increases the chance that pests and quarantined matter may enter the State. RT 616.

Aside from worker preferences, there are two other policy reasons why all inspectors have to work shifts throughout the entire week, including Saturdays. First, to avoid collusion between commercial shippers and inspectors, inspectors have to work unpredictable and varying shifts so that shippers cannot rely on a particular inspector being on duty at particular times. RT 864-865, 931-933. Second, different types of commodities and shippers enter the State at different times of the week. RT 423, 468-470, 479. For example, shippers of Florida and Texas produce time their entry into the State so that produce will arrive on weekends for distribution from wholesale markets at the beginning of the week. RT 934-935. For training purposes, inspectors need to work all of the different shifts, including those on Saturday, to be exposed to the full range of commodities and shippers which arrive at different times. RT 423-425, 468, 480, 936. Satisfying all of these scheduling requirements and policies was hard enough at a large station like Yermo. RT

409, 936. However, inspectors could be, and had been, assigned to smaller inspection stations, which might have only four to six employees. RT 404-407, 541, 555. Scheduling an inspector, like respondent to have a fixed twenty-four hour period off every week at such a small station would be virtually impossible. RT 542, 641-642, 1017-1018. Because it was not unusual for a Yermo inspector to be assigned to a small station on a temporary basis, RT 406-407, respondent's Sabbath observance would restrict such assignments in his case. Because there were only five supervisors at Yermo, it also would be virtually impossible to give respondent a fixed twenty-four hour period off every week if he became a supervisor. RT 647.

Plant inspectors were allowed to voluntarily trade or swap shifts among themselves subject to management approval. RT 400-401, 937. However, because employees preferred Saturdays off, RT 440-442, 476-477, 501, 1012; ER 48, getting someone to take one's Saturday shift was difficult. RT 441-442, 633. Getting another inspector to give up a weekday shift for a Saturday one was very unlikely. RT 439, 633, 640. The most likely trade was a Saturday shift for a Sunday one. RT 441, 633. However, the pool of people with whom one might make such a Saturday-Sunday trade was generally limited to only two other inspectors. RT 636-637.[2] Inspectors typically tried to

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[2] The pool for Saturday-Sunday trades was small because a rank-and-file inspector could not take the place of, and swap with, a supervisor. RT 638-639. The FLSA work week requirements also narrowed the pool because the person taking the Saturday shift could not also be assigned a shift either before or after the Saturday shift without running afoul of the eight hour shift limitation; nor could the person exceed a forty hour work week. RT 436-438, 635.

swap one eight hour shift once a month. RT 375, 430, 886. Even with this low swap rate, inspectors often could not find others with whom to trade, even when they had compelling reasons for the swap like a family emergency. RT 434-435, 499, 653, 887, 1025. When employees could not arrange a swap, they had to work their assigned shift. RT 434-435, 499. The Yermo inspector who testified on the subject was not willing to trade shifts with respondent on a permanent basis, and thought it unfair that respondent receive a twenty-four hour period off every week on Friday and Saturday. RT 445-446, 458, 462.

In the past, efforts had been made to temporarily accommodate the needs of some inspectors for time off for things like college courses or Church meetings. RT 433, 624-625, 954-955. However, past accommodations had been temporary (i.e., for the duration of a college semester), had involved one shift rather than a twenty-four hour period, and were always subject to cancellation to satisfy overriding CDFA needs. RT 433, 866, 891, 1016, 1058-1059. There is no evidence that any inspector ever sought or was granted a permanent twenty-four hour block of time off spanning two days every week which was not subject to modification for CDFA needs, like that sought by respondent. One Seventh Day Adventist had worked as a temporary employee during the summer when she was a college student, and the border station manager had tried to accommodate her Saturday Sabbath observance. RT 690-708, 713. However, she had been required to work one Saturday in an emergency. RT 700-701.

A previous instance of religious accommodation had caused both morale problems and disruption of the

inspection program. One inspector in the Truckee, California border station was a lay Protestant minister who would fill in on Sunday mornings if the assigned preacher was absent. App. 75. Initially, this lay minister arranged trades of his Sunday morning shift, but over time the station manager scheduled the lay minister to work Sunday afternoons or the Saturday graveyard shift instead of Sunday morning. App. 75-76. Five or six Catholic inspectors then requested a similar accommodation on Sunday morning so that they could attend their church services. *Id.* The station manager had to deny this request because it would have made it impossible to cover the Sunday morning work shift. App. 78. The Catholic employees then filed a formal grievance with CDFA which ended the special accommodation of the Protestant minister. App. 75-76; RT 1055-1057. Because the time off that was sought by respondent was a twenty-four hour period rather than one eight hour shift, respondent's requested accommodation would be more disruptive of the work schedule and more of a special privilege than that which caused the employee protest at Truckee.

The District Court's Decision

The district court analyzed three possible accommodations of respondent's Sabbath observance: 1) scheduling respondent so that he had no shifts during his Sabbath; 2) relying upon voluntary trades of shifts to accommodate respondent; and 3) transferring respondent to another border station or CDFA position where he might avoid work on his Sabbath. App. 55. The district court concluded that all of these alternatives imposed undue hardship. App. 59.

First, the district court found that scheduling respondent's shifts to avoid work during his Sabbath would have a discriminatory impact on other employees who would have to work more than their fair share of Friday night graveyard and Saturday shifts which they preferred to have off. App. 61. The small size of the inspector work force accentuated this discriminatory impact. *Id.* Respondent also would not be available to cover for other inspectors who might become sick during his Sabbath, and CDFA would be less able to accommodate other employees who might need time off on Saturdays on a temporary basis. App. 62. The district court also noted that giving respondent his Sabbath day off would cause morale problems within the station, and might prompt further requests for accommodation from other employees. App. 63. The court rejected respondent's suggestion that these morale problems were purely speculative, and cited the example of the lay minister at Truckee. App. 70.

The district court also found that giving respondent a preferential schedule would impose an undue hardship on the State by forcing it to either hire temporary employees to fill in for respondent on his Sabbath, or operate shorthanded on Saturday, one of the busier days. App. 61. Respondent's offer to work more Sundays or other times was unavailing because it was contrary to the state policy of maintaining unpredictable work schedules to avoid collusion with shippers. App. 62. Relying on *Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 85, the district court concluded that giving respondent a special schedule to accommodate his Sabbath would "allocate 'the privilege of having Saturdays off . . . according to religious beliefs,' contrary to *Hardison.*" *Id.*

Second, the district court found that voluntary trades of shifts was not a reasonable accommodation because the informal poll of Yermo employees showed that none of the other employees were willing to accommodate respondent's schedule on a permanent basis. App. 63. Moreover, other employees often had been unsuccessful in arranging even temporary shift trades. *Id.* Consequently, it "would have been only a matter of time before [respondent] would have been unable to find a replacement to work his designated shift." *Id.*

Third, the court found that the alternative of transferring respondent was not reasonable for several reasons. Civil service rules required one to pass a particular exam for a particular position so respondent could not simply be transferred to another 9 to 5 job in CDFA. App. 64. There also was no evidence of other openings within the plant inspector branch. *Id.* Because many other inspection stations were smaller than the Yermo station, accommodating respondent at those stations would have been even more burdensome if not virtually impossible. *Id.*

Finally, the district court rejected respondent's argument that the State must attempt a "temporary" accommodation while searching for a more "permanent" accommodation. The court found that the State did not have to implement an accommodation alternative in order to establish its infeasibility and excessive hardship. App. 71-72.

The Ninth Circuit's Decision

The Ninth Circuit, in a 2-1 decision by Judge Reinhardt, reversed, and held that the district court's findings of undue hardship were clearly erroneous. The Ninth

Circuit distinguished *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. 63, on the ground that it involved a contractually-established seniority system. App. 17. According to the Ninth Circuit, the adverse impacts on co-workers of accommodating respondent were "not only *de minimis* and non-discriminatory, but hypothetical", App. 13, n. 12. The Ninth Circuit reasoned that respondent could simply work some other "undesirable weekend, holiday or night shift" to make up for not working on his Saturday Sabbath. App. 19. In reaching this conclusion, the Ninth Circuit disregarded the evidence that workers preferred Saturdays off, and that these different categories of undesirable shifts were not *equally* undesirable, i.e., working a night shift is not as bad as working Christmas, a holiday. The Ninth Circuit also said that no other "cognizable burden[s]" were imposed on co-workers, *id.*, even though accommodating respondent would reduce the four day breaks, uninterrupted breaks, simultaneous vacations, and opportunity for temporary time-off for other employees, and even though respondent would not have to cover for other employees or be available for emergency work on his Sabbath, like every other employee.

The Ninth Circuit also ruled that the informal poll of Yermo employees – which showed that none of them were willing to trade shifts with respondent on a permanent basis – was inadmissible hearsay. App. 21. To properly "poll" Yermo employees and facilitate voluntary shift trades, the Ninth Circuit required CDFA to change its practice of preparing month-to-month shift schedules and instead prepare a six month or one year shift schedule. Using this new schedule, CDFA could determine how many Sabbath shifts respondent would be assigned, and

how many co-workers would be willing to trade shifts with him. App. 20, 24-25, n. 22. The Ninth Circuit went on to speculate that "[i]t is not unreasonable to assume that other employees would be willing to trade for many, if not all, of [respondent's] Sabbath shifts". App. 20.

The Ninth Circuit also thought that morale problems resulting from accommodating respondent were "hypothetical", App. 27, despite the undisputed evidence of how a Sabbath accommodation at Truckee had triggered formal complaints by co-workers, and had threatened CDFA's ability to staff the similarly-sized Truckee station on Sunday. The Ninth Circuit also said that footnote 15 in *Hardison, supra*, 432 U.S. at 84, n.15 – which allows consideration of further accommodation requests by other employees in assessing "undue hardship" – was "dictum" that was entitled to "little weight." App. 28, n.25.

Finally the Ninth Circuit held that the State must attempt a "temporary" accommodation of respondent's Sabbath observance during respondent's probationary work period, and then transfer him to some other position, either in CDFA "or elsewhere in State employment", App. 30, if "temporary" accommodation as a plant inspector was unworkable. In requiring such temporary accommodation and later transfer, the Ninth Circuit ignored state civil service rules which require successful completion of civil service examinations for particular employment positions.

Judge King, dissented from Judge Reinhardt's decision, and would have affirmed the district court for the reasons stated by that court. App. 31.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The Ninth Circuit's decision conflicts with *Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. 63. As in this case, *Hardison* involved a workplace that operated twenty-four hours a day where one employee, Hardison, sought not to work on his Saturday Sabbath. Accommodating Hardison's Sabbath observance, however, would burden other employees by requiring them to work his Saturday shifts (which they preferred to have off), and by violating the seniority system, the neutral mechanism for allocating shifts. The Court held that Title VII did not require accommodation of Hardison's Sabbath because it would result in unequal treatment of other employees, and allocate Saturdays off by religious rather than neutral criteria. As the Court explained: "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." 432 U.S. at 81. Other possible accommodations of Hardison which did not require co-workers to work involuntarily in Hardison's place "involve[d] costs to [the employer], either in the form of lost efficiency in other jobs or higher wages." *Id.* at 84. These alternative accommodations also were not required because they imposed "more than a *de minimis* cost in order to give Hardison Saturdays off" and thereby constituted "undue hardship" under Title VII. *Id.* at 84. Consequently, *Hardison* establishes that a religious accommodation exceeds Title VII, and imposes an "undue hardship" when it

either (1) has a discriminatory impact on other employees and allocates workplace requirements or privileges according to religious rather than neutral criteria, or (2) imposes more than *de minimis* costs on the employer, such as reduced workplace efficiency or higher wage costs.

The Ninth Circuit erroneously thought that *Hardison* was distinguishable because it involved a seniority system established through collective bargaining. But as other circuits have held, the principles in *Hardison* and the limits on religious accommodation are not restricted to the collective bargaining context. See *Beadle v. Hillsborough County Sheriffs Dept., supra,* 29 F.3d at 593; *Eversley v. MBank Dallas,* 843 F.2d 172, 175 (5th Cir. 1988); *Brener v. Diagnostic Center Hospital, supra,* 671 F.2d at 146 n.5. As the Court noted in *Hardison,* a seniority system is merely one form of a "neutral system" of allocating shifts. "Rotating shifts" – which is at issue in this case – was recognized in *Hardison* as another example of a "neutral" shift allocation mechanism. See 432 U.S. at 80. Thus, this case, like *Hardison,* involves the same displacement of a neutral system of shift allocation by religious criteria, and the same "undue hardship" imposed upon co-workers in a round-the-clock workplace.

More importantly, the *Hardison* limits on religious accommodation stem not from collective bargaining requirements but from the Establishment Clause. An *absolute* requirement to accommodate Sabbath observance regardless of the adverse impacts on co-workers or the employer was held in *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703 (1985) to violate the Establishment Clause. Religious accommodation in that case was unconstitutional precisely because there were no "reasonableness" limits on the burdens that religious accommodation could place

upon co-workers and the employer. See 472 U.S. at 708-710; *Id.* at 712 (O'Connor, J., concurring). Without such reasonableness limits, religious accommodation under Title VII, like the "absolutist" accommodation in *Estate of Thornton, supra,* would have the primary effect of impermissibly advancing religion in violation of the Establishment Clause. Without reasonableness limits, Title VII would step over the line from the secular purpose of assuring equal employment opportunity in a religiously diverse society, and become a governmental device for advancing religion by allocating work place benefits on religious grounds.

The discriminatory burdens and impacts on co-workers in this case are at least as great as those in *Hardison*. The burden of accommodating respondent falls on an extremely small group of nine co-workers who will have to work respondent's Sabbath shifts, provide cover and be available for emergency work during the Sabbath when he is not, and have reduced opportunities for four day breaks, uninterrupted breaks, simultaneous vacations, and temporary time off. As in *Hardison*, the neutral mechanism of rotating shifts will be replaced by the allocation of desirable Saturdays off through religious criteria. Title VII will have become the cause of, rather than the remedy for, discrimination in the workplace. In *Hardison*, the Court rejected such a reading of Title VII, finding that the statute did not "require an employer to discriminate against some employees in order to enable others to observe their Sabbath." 432 U.S. at 85.

Reasonableness limits are crucial in this case because of the danger of engendering religious divisiveness in the State's workforce. A fundamental principle of the Religion Clauses is that " 'The First Amendment . . . gives no

one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' " *Estate of Thornton, supra*, 472 U.S. at 710, quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953). Burdening respondent's co-workers in order to accommodate his Sabbath observance threatens to disrupt workplace morale. This already had occurred at the Truckee station where accommodating a Protestant's Sabbath observance led to protests by Catholics. Avoiding divisions along religious lines should be just as important in the workplace as it is in the political arena. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-624 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794-798 (1973). Because the affected work force is so small here, accommodating the Sabbaths of other employees is physically impossible. This means that any accommodation benefits flow only to respondent and not other religious groups, the type of governmental preference *among* religious groups that most offends the Establishment Clause. See *Larson v. Valente*, 456 U.S. 228, 244 (1982).[3]

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[3] The Ninth Circuit thought that the small work force made religious accommodation *easier* because it was less likely that other co-workers would seek similar religious accommodations. App. 28, n.25. The district court was more realistic, and found that the smaller work force made accommodation *more difficult* because the burdens of assuming respondent's Sabbath shifts would fall on fewer workers. App. 61. The Ninth Circuit's speculation that no one else would seek similar accommodations is belied by the Truckee episode, the evidence that other co-workers kept track of the allocation of shifts and complained if they perceived unfairness, and the co-worker testimony that giving respondent his Saturday Sabbath off would be unfair.

The Ninth Circuit's sole reason why accommodating respondent would not discriminate against his co-workers was its belief that Saturday, Sunday, holiday, and night shifts were all equally undesirable and fungible; therefore, respondent could work some of those shifts in place of Saturday without receiving any "preferential" treatment. However, the Ninth Circuit's notion that these shifts are all equally undesirable is contrary to the district court's findings and the undisputed evidence.[4] Consequently, this case has the same discriminatory impact on worker shift preferences that made accommodation an "undue hardship" in *Hardison*.

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[4] The district court found that one of the constraints on scheduling shifts was the need for each employee to work "an equal number of undesirable weekend, holiday, and night shifts". App. 60. This finding did not mean (as the Ninth Circuit assumed, see App. 19) that all of these shifts were *equally* undesirable. Instead, it meant that there was a need to equalize each of the *three categories* of shifts, i.e., weekend and weekday, day and night, and holiday and non-holiday shifts. The district court, in fact, *rejected* the notion that having respondent work more night, Sunday and holiday shifts in place of Saturday shifts would eliminate any discrimination or preferential treatment vis-a-vis co-workers. See App. 59. Supervisors testified that they tried to equalize *each* of these categories of shifts, not that the shifts were lumped together into one generic "undesirable" category. See RT 601-605, 930, 1053-1054. Other employees testified, and the district court found, App. 61, that most people preferred to have Saturdays off. In addition, the evidence showed that arranging a voluntary trade of a night shift for a Saturday shift would be "very hard", RT 640, and that the only realistic trades were a Sunday for a Saturday shift. See RT 439-441, 633. Common sense also tells one that these shifts would not be equally undesirable, i.e., working a night shift is not as undesirable as working on a holiday, like Christmas or Thanksgiving.

The adverse impacts and costs imposed upon the State are also more than *de minimis*, and at least as great as those in *Hardison*. Accommodating respondent would undermine the policies of having unpredictable shifts to avoid collusion, and working all shifts to obtain experience in the different commodity and shipper patterns on different days. Respondent also would not be as productive and efficient a worker as other inspectors because he would not be available for cover or emergency assignment on his Sabbath like other workers; he could not be promoted to a supervisory position; and he could not be transferred to a small inspection station if the need so arose. Accommodating respondent also requires the State to change the way it schedules shifts from a month-to-month basis to a six month or yearly basis which reduces the State's flexibility in deploying inspectors for other temporary assignments. All of these adverse impacts on the State pest inspection policies, manpower efficiency, and work scheduling are not *de minimis* costs.

Finally, the Ninth Circuit's requirement that the State must attempt a temporary accommodation despite the evidence of undue hardship, is essentially a presumption that accommodation is always feasible. This is not far removed from the absolutist requirement of accommodation struck down in *Estate of Thornton*. Accordingly, the Court should grant review because the Ninth Circuit failed to comply with the standards for "undue hardship" in *Hardison*, and because the type of accommodation required here violates the Establishment Clause.

2. The extent of religious accommodation required by the Ninth Circuit is so disruptive of the State's work force and policies, that it raises serious questions under the Tenth Amendment. The Ninth Circuit's requirement

that respondent be transferred to some other job in State service if his temporary accommodation as a plant inspector fails ignores State civil service requirements. Specific State positions are filled on the basis of a competitive civil service examination for that position. Allowing respondent to take the civil service exam for the plant inspector position – which is *less* competitive because of the round-the-clock work schedule for that position, RT 874 – and then transferring him to some other 9-5 State job when he cannot fulfil the work schedule requirements of the plant inspector position – violates the State's civil service system, and is unfair to other job applicants. Just as Title VII remedial actions were not allowed to violate a collectively-bargained seniority system in *Hardison*, so too the Title VII remedy in this case should not have overridden the State's legitimate civil service requirements for its work force.

The Ninth Circuit's temporary accommodation requirement also means that the State must hire an individual – who indisputably does not satisfy the work availability requirements for the position for which he is hired – and allow that person to proceed through the probationary period to permanent civil service employment status. This forces the State to take into its permanent work force employees who, at the very outset of the employment relationship, do not satisfy neutral civil service requirements for the positions they are ostensibly filling.

The Ninth Circuit also requires the State to redo the way it schedules shifts, and adopt a six month or yearly schedule to facilitate shift trades by respondent. This seriously reduces the State's flexibility in allocating its

work force because inspectors are often temporarily reassigned on short notice to other border stations or are deployed to other parts of the State for emergencies.

Finally, the Ninth Circuit's decision undermines both the policy of unpredictable schedules to avoid collusion, and the policy of exposing inspectors to all shifts to obtain experience and training in different commodity and shipper traffic. The Ninth Circuit minimized the impact on the first policy, and ignored the second. All of these practices and policies go to the heart of the State's ability to recruit, organize, and train its work force for quasi-law enforcement functions. Insofar as Title VII authorizes religious accommodation which violates these State policies and interests, including legitimate State civil service requirements, it violates the Tenth Amendment.

3. The Ninth Circuit also failed to correctly apply the "clearly erroneous" standard in reviewing the district court's decision. The "undue hardship" issue is reviewable, as the Ninth Circuit acknowledged, under a clearly erroneous standard. App. 11-12; see also *Anderson v. Bessemer City*, 470 U.S. 564, 566 (1985). As the Court explained in *Anderson, supra,*: "Th[e] [clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." 470 U.S. at 573. Instead, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-574; see also *Cooter & Gell v. Hartmax Corporation*, 496 U.S. 384, 400 (1990).

In setting aside the district court's factual findings as clearly erroneous, the Ninth Circuit reweighed the evidence in a *de novo* fashion, just as in *Anderson*. Probably the most glaring example of this reweighing was the appraisal of the Truckee evidence. The district court found that the Truckee episode was evidence that accommodation was likely to cause morale problems and further disruptive requests for accommodation. App. 70-71. In contrast, the Ninth Circuit read the same evidence as an indication that religious accommodation would be successful. App. 30, n. 26.[5]

The Ninth Circuit also ignored some of the district court's factual findings which supported that court's decision. Examples were the district court's finding that rearranging shifts was difficult because of numerous constraints on shift scheduling, App. 60; that accommodating respondent as a supervisor would be virtually impossible, App. 61, n. 16; that accommodating respondent would burden other co-workers who would have to provide cover and be available for emergency assignments on respondent's Sabbath, App. 62; that other employees had been unable to make voluntary shift trades even on a temporary basis, App. 63; that accommodation at smaller stations would be even more difficult, App. 64; and that

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[5] The Ninth Circuit's statement that the Truckee lay minister was "accommodated for a period of ten years", App. 30, n. 26, is not supported by any citation to the record. A CDFA program supervisor testified that the Truckee accommodation, which started out as a voluntary shift trade and then "degenerated" into mandatory shift scheduling by the station supervisor, RT 953, lasted "two, possibly three years." RT 1053, l.3.

civil service competitive examination requirements would restrict transfers to another position. *Id.*

The Ninth Circuit also summarily dismissed other factual findings by the district court without any explanation. For example, evidence of the inability to accommodate the scheduling needs of other employees was simply labelled "wholly inadequate", App. 27; and evidence of morale problems was deemed "hypothetical". *Id.* See *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857 (1982) (appellate court not entitled "simply to disregard the District Court's finding of functionality"; nor was it entitled to dismiss it "as not 'persuasive'.") In other places, the Ninth Circuit misunderstood the district court's factual findings; for example, the district court's finding that scheduling was arranged to equalize "undesirable weekend, holiday, and night shifts" did not mean that these three types of shifts were equally undesirable, but rather that each category of shift needed to be equalized. The Ninth Circuit's statement that the district court did not rely on any "independent" evidence that employees were unwilling to accommodate respondent, apart from the informal poll, App. 23, also is incorrect. The district court specifically found that apart from the poll, accommodation through trades was unlikely because other employees had been unable to obtain their own voluntarily trades in the past even on a temporary basis. App. 63.

The Ninth Circuit even reevaluated the reliability of witness testimony, a task uniquely suited to the fact-finder, not the reviewing court. See App. 6, n. 3 (testimony regarding the informal poll was "vague and uncertain"; App. 22, n. 19 (Ingham's testimony "is not reliable"). The Ninth Circuit also relied on factual

assumptions contradicted by the evidence; for example, the assumption that "other employees would have been willing to trade for many, if not all, of [respondent's] Sabbath shifts", App. 20, is an assumption that not even *respondent* was willing to make. See RT 289, l. 1-4. The Ninth Circuit's assumption is also contradicted by the evidence that other inspectors often had been unable to obtain trades, that the only realistic swaps were Saturday-Sunday trades which would involve a very small pool of individuals, and that the inspector who testified on the subject was not willing to trade with respondent on a permanent or regular basis. The Ninth Circuit also erroneously excluded the evidence of the informal poll which showed that none of the polled employees were willing to swap shifts with respondent on a permanent basis.[6] Finally, the Ninth Circuit devised its own accommodation alternative of changing shift schedules from a

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[6] Surveys and polls can be admitted as evidence under either: (1) the hearsay exception for state of mind in Fed. R. Evid. 803(3), see *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 931 (7th Cir. 1984); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation*, 533 F.2d 510, 520 (10th Cir. 1976); (2) the general hearsay exception for otherwise trustworthy evidence in Fed. R. Evid. 803(24), see *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978); or (3) as the basis for an expert opinion under Fed. R. Evid. 703, see *Piper Aircraft Corp, supra*, 741 F.2d at 931; *Baumholser v. Amax Coal Co.*, 630 F.2d 550, 553 (7th Cir. 1980). Here, all of these bases for admission apply. The informal survey shows the state of mind of co-workers as to their willingness to trade, not the truth of whether trades will or will not occur; therefore it is admissible under Rule 803(3). Ingham was also designated as an expert on shift scheduling, RT 1120; ER 45; respondent conceded that he qualified as an expert on this subject, RT 1121; Ingham gave an opinion that voluntary swaps were infeasible, RT 1020, and he relied upon the informal poll in supporting this opinion. RT 1080; therefore,

month-to-month to a six month or yearly basis even though this alternative was never litigated below. Obviously, if the appellate court devises new accommodation alternatives when the employer cannot present evidence that they are infeasible or burdensome, the appellate court is subjecting a litigant to a fundamentally unfair process. In sum, the Ninth Circuit misapplied the "clearly erroneous" standard, improperly reweighed the evidence

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the poll was admissible under Rule 703. The Ninth Circuit also erroneously found that the poll was untrustworthy, and was therefore inadmissible under Rule 803(24). Although Lozano thought that the poll assumed that respondent sought three days off, Ingham, the person who arranged the poll, and Whitacre, another supervisor, both testified that the poll covered the two days involved in respondent's Sabbath. RT 971, 987, 536. (Contrary to the Ninth Circuit's assumption, respondent's 24 hour Sabbath period covers *two* working days, Friday and Saturday, not one day, see RT 1013). Everyone who testified about the poll was in agreement as to the result – no one was willing to accommodate respondent on a permanent, ongoing basis. Admittedly, the circumstances of the poll were vague because the poll occurred eleven years before, and people were testifying from memory. But as the Ninth Circuit said elsewhere: "Technical inadequacies in the survey, including the format of the questions or the manner in which it was taken, bear on the *weight* of the evidence, not its admissibility." *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989) (emphasis added); see also *Piper Aircraft, supra*, 741 F.2d at 930-931. Because Ingham directed that the poll be taken and formulated the inquiry, he was the survey director who was available for cross-examination at trial. Ingham alone could establish the foundation for the poll without the need for testimony from those who actually conducted the poll. *Keith, supra*, 858 F.2d at 481; *Piper Aircraft, supra*, 741 F.2d at 931.

on its own, and failed to observe its proper role as a reviewing court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Kwasi OPUKU-BOATENG,
Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; Clare Berryhill; Mimi Khan; Gloria Harmon, Defendants-Appellees.

No. 94-16542.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 8, 1995.

Decided Sept. 19, 1996.

Applicant for permanent employment with state agency sued state and several agency employees under Title VII for religious discrimination. The United States District Court for the Eastern District of California, Milton L. Schwartz, J., entered judgment for state, finding that applicant established prima facie case, but that state demonstrated that accommodating applicant's religious beliefs would have caused undue hardship. Applicant appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) employee established prima facie case of religious discrimination, and (2) employer failed to establish undue hardship from proposed accommodations, either in the nature of an undue burden on employer or discriminatory treatment of coemployees.

Reversed.

Samuel P. King, Senior District Judge, sitting by designation, filed dissenting opinion.

Lee Boothby, Boothby & Yingst, Berrien Springs, Michigan, for plaintiff-appellant.

Charles W. Getz, Deputy Attorney General, San Francisco, California, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California, Milton L. Schwartz, District Judge, Presiding. D.C. No. CV S-87-755-MLS.

Before: REINHARDT and BOOCHEVER, Circuit Judges, and KING, District Judge.*

REINHARDT, Circuit Judge:

This is a case involving an employer's obligation to accommodate a worker's religious beliefs and, in particular, the commitment to observe the Sabbath. Kwasi Opuku-Boateng, a temporary employee of the California Department of Food and Agriculture ("the Department"), sought permanent employment with the Department. He was selected for a permanent position but, when he advised the Department that he was unable to work on Saturdays because of his religious beliefs, the Department terminated the hiring process. Opuku-Boateng sued the State of California and several Department officials ("the State"), claiming that the State denied him a position on the basis of his religion, in violation of Title VII of the Civil Rights Act of 1964. He sought reinstatement of employment and benefits, back pay, and reasonable attorney's fees and costs, as well as declaratory and injunctive relief. The district court concluded that Opuku-Boateng

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

had established a prima facie case of discrimination but that the State had demonstrated that accommodating his religious beliefs would have caused undue hardship. Accordingly, it entered judgment in favor of the State. We reverse.

BACKGROUND

Opuku-Boateng is a devout member of the Seventh Day Adventist Church. The Church teaches its members to observe the Sabbath from sundown Friday to sundown Saturday and to refrain from engaging in secular work during that period. It further teaches that repeated violations of the Sabbath observance imperil one's salvation. Opuku-Boateng, adhering to the tenets of his faith, and concerned about his ultimate salvation, observes the Sabbath. Indeed, as the district court noted, he has never worked on the Sabbath and refuses to do so under any circumstances.

During the summer of 1982, Opuku-Boateng, who held a temporary position as a Grain Inspector for the Department, sought some form of permanent position.[1] He applied for numerous positions, including Plant Quarantine Inspector ("Plant Inspector").[2] The Plant Inspector application asked the applicant to indicate if his religious

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[1] The Grain Inspector position did not require that Opuku-Boateng work on the Sabbath.

[2] Plant Inspectors examine vehicles for quarantined agricultural products. The announcement for the position specified that applicants must be willing to work holidays, Sundays, and odd hours. Opuku-Boateng has expressed a willingness to work these days and times.

beliefs prevented him from sitting for the examination on Saturdays. Despite having answered the question affirmatively, Opuku-Boateng received a notice that he was scheduled to take the examination on that day. Upon receiving the notice, he immediately called the listed contact person, Diane Sheff, who made arrangements for him to take the test on a Sunday.

During the interview, Opuku-Boateng and the interviewers, Sheff and Chuck Gray, discussed neither the subject of working hours nor of Opuku-Boateng's religious beliefs. Having previously indicated that he could not take the examination on his Sabbath, and having made arrangements to take it on a Sunday instead, Opuku-Boateng assumed that Sheff and the Department knew of his inability to work on Saturdays. Following the interview, Opuku-Boateng spoke by telephone with Gray on at least one occasion. Gray asked whether he had a preference for any particular station, and he responded that any station would be acceptable. When Gray cautioned that certain stations had less desirable living accommodations than others, he stated that his only concern was whether the station would be near an Adventist church.

On October 18, 1982, Opuku-Boateng received an appointment as a Plant Inspector to the border-inspection station in Yermo, California, to begin on November 2. The Yermo station employed a total of 15 inspectors, including 5 supervisors. It operated seven days a week, twenty-four hours a day, and maintained three eight-hour shifts – day, evening, and night. The size of the staff and the number of shifts would increase, however, during certain times of the year, such as the summer months. RT 354-11

to -21; RT 355-18 to 356-3. Departmental policy required that work assignments be made as equitably as possible. As the district court found, all employees at the Yermo station were required to work "an equal number of undesirable weekend, holiday, and night shifts." ER 141. Departmental policy further required that employees be assigned varying schedules to avoid the possibility of collusion between inspectors and "the travelling public or trucking industry," RT 931-18 to -20, and to expose inspectors to the various commodities that were transported through the station at different times, RT 934-4 to -7, 936-9 to -16.

After being selected for the permanent position, Opuku-Boateng terminated his temporary employment, and moved his family to Yermo. On October 28, Opuku-Boateng visited the station, accompanied by the local Adventist pastor. He reviewed the posted work schedule and learned that he was scheduled to work on an upcoming Saturday, November 14. He informed the acting supervisor, William Whitacre, that his religious beliefs precluded him from working on his Sabbath. Whitacre advised Opuku-Boateng that unless he was willing to work on Saturdays, his appointment would not be processed. Opuku-Boateng left the station and immediately telephoned Charles Gray, whose name was listed on the appointment letter, to inform him of the problem. Gray initially agreed with Whitacre's assessment, indicating that it would be necessary for Opuku-Boateng to work Saturdays, but later said that he would have to discuss the matter with his superiors. RT 115-1 to 116-3.

Over the next week, Opuku-Boateng and representatives of the local Adventist parish negotiated with various Department representatives in an attempt to find a solution. Opuku-Boateng offered to work undesirable non-Sabbath shifts (i.e., Sundays, nights and holidays) in place of the Sabbath assignments he would ordinarily receive; to trade shifts with other employees; or to transfer to another station or another position within the Department. At some undetermined point, Howard Ingham, a Program Supervisor for the Department, instructed a supervisor in the Yermo station, whose identity he no longer recalls, to conduct a poll of the staff to determine whether voluntary trading of shifts to accommodate Opuku-Boateng would be feasible.[3] According to the district court, "[a]lthough one or two employees said they would be willing to do so on rare occasions, none were willing to accommodate [Opuku-Boateng] permanently."[4]

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[3] Testimony regarding the poll was vague and uncertain. Three witnesses testified regarding the poll: Ingham, Whitacre, and Maria Lozano, an employee at the Yermo station. Neither Ingham nor Whitacre could state whether the poll was taken prior to a final decision on Opuku-Boateng's appointment. *See* RT 1006-5 to -6. Lozano, however, remembered being questioned before November 2, 1982, the date on which Opuku-Boateng was scheduled to begin work. RT 443-5 to -12.

[4] Opuku-Boateng objected to Ingham's testimony regarding the poll on hearsay grounds, RT 998-16 to -17, but the district court allowed Ingham to testify. The district court stated,

> I'm admitting the evidence that a poll was taken – the fact that a poll was taken itself can be hearsay, but it is

By letter dated November 1, Ingham informed Opuku-Boateng that his request for an accommodation had been reviewed. Ingham noted that the Plant Inspector examination announcement specified "[w]illingness to work holidays, Sundays, and odd hours" and that "[t]he workload at the border stations is heaviest during the weekend period. . . . " Because "[m]ost employees want as many weekends off as possible," he stated that it was most difficult to schedule shifts to provide "for adequate coverage." ER 48. He concluded that "the request of wanting two specific days off each week" was not considered reasonable,[5] and advised Opuku-Boateng that if he

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> received of course not for the truth of what was developed. . . .
>
> I'm going to permit him to testify to what results were reported to him with the understanding that they are not being accepted . . . as proof of the truth of the outcome of the poll. . . .

RT 1003-13 to 1004-1.

Ingham stated that he was told that none of the Yermo station employees was willing to accommodate Opuku-Boateng on a regular basis. Whitacre recalled the poll but said that he could not state what question was asked or how many employees were contacted. Lozano recalled that when asked whether she would be willing to accommodate Opuku-Boateng, she said that she was willing to trade shifts but not on a permanent basis. However, Lozano also recalled being told that the accommodation would involve three days per week, Friday, Saturday, and Sunday. RT at 3446-7 to 10, -15 to -18; 445-15 to -17.

[5] There is no evidence in the record that Opuku-Boateng ever asked for anything other than one consecutive 24-hour period off each week, namely, his Sabbath.

wanted to be employed as a Plant Inspector, he would be "expected to work assigned shifts as scheduled." ER 48.

On November 3, Claude Morgan, an attorney for the Church State Council, filed a complaint with the State Personnel Board, claiming violations of state and federal law. Morgan stated that Opuku-Boateng's religious beliefs could be accommodated and that he had proposed various feasible accommodations, such as providing a "temporary schedule adjustment pending development of a satisfactory accommodation, asking the cooperation and assistance of the appropriate labor union and arranging a schedule adjustment,[6] surveying employees to request their cooperation in developing an accommodation, and [providing] an immediate leave of absence to allow location of opportunities for transfer." ER 50. He stated, however, that Department representatives had repeatedly refused to accept any of these proposed accommodations or to explore any other alternatives.

On November 8, Ingham informed Opuku-Boateng that the appointment would not be made. He stated that since Opuku-Boateng could not be "available to work frequently from Friday sundown through Saturday sundown," the appointment process would be terminated.

Opuku-Boateng filed a complaint with the Equal Employment Opportunity Commission. The District

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[6] The record does not reflect any other mention of a labor union or that any organization had a contract to represent the station employees. Accordingly, we treat this part of the request as simply asking the employer to make a schedule adjustment.

Director determined that the Department "made absolutely no attempts to consider any accommodation." It concluded that there was reasonable cause to believe that the Department had violated Title VII by refusing to hire Opuku-Boateng. After he exhausted his administrative remedies, the Commission issued him a right-to-sue letter.

Opuku-Boateng filed an action claiming that the denial of his appointment violated Title VII. Following trial, the district court entered judgment in favor of the State. It concluded that although Opuku-Boateng established a prima facie case of religious discrimination, the State had demonstrated that it could not reasonably have accommodated his religious beliefs without suffering undue hardship.

DISCUSSION

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating on the basis of religion.[7] It defines the term "religion" to include "all aspects of religious observance and practice, as well as belief," and imposes a duty of reasonable accommodation on employers. 42 U.S.C. § 2000e(j).[8] It is therefore unlawful

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[7] Section 2000e-2(a) states in part that "[i]t shall be an unlawful employment practice for an employer . . . to refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . . " 42 U.S.C. § 2000e-2(a)(1).

[8] "The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of

"for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74, 97 S.Ct. 2264, 2271-72, 53 L.Ed.2d 113 (1977).

We assess Title VII religious discrimination claims using a two-part analysis. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir.1993). First, the employee must establish a prima facie case of religious discrimination. *Id.*[9] Second, if the employee does so, the burden shifts to the employer to show that it " 'negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs.' " *Id.* (quoting *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir.1989)). Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do

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religion." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n. 1, 107 S.Ct. 367, 369 n. 1, 93 L.Ed.2d 305 (1986).

[9] In order to establish a prima facie case of religious discrimination, a plaintiff must meet a three-part test. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n. 5 (9th Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989). The employee must establish that "(1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him or subjected him to discriminatory treatment . . . because of his inability to fulfill the job requirements." *Heller*, 8 F.3d at 1438. The employee need not be penalized with discharge to establish a prima facie case. *Townley*, 859 F.2d at 614 n. 5. ("The *threat* of discharge (or other adverse employment practices) is a sufficient penalty.").

so. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989). Only if the employer can show that no accommodation would be possible without undue hardship is it excused from taking the necessary steps to accommodate the employee's religious beliefs. *See Heller*, 8 F.3d at 1440; *Townley Eng'g*, 859 F.2d at 615.

Prima Facie Case

The State concedes that Opuku-Boateng established a prima facie case of discrimination. First, he established that observance of his Sabbath is a bona fide religious practice and that it conflicts with the employment duty to be available to work on Saturdays. Second, he demonstrated that he notified the State upon learning of the conflict between his religious beliefs and the employment duty. Last, he proved that the failure to hire him was a result of the conflict.[10]

Reasonable Accommodation and Undue Hardship

Because Opuku-Boateng established a prima facie case of discrimination, the State was required to establish that it did not violate the statutory duty to accommodate his observance of the Sabbath. We review for clear error the district court's determination whether an employer has violated its statutory obligation to make good-faith

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[10] The State specifically informed Opuku-Boateng that "since you are unable to meet [the requirement to be available to work frequently from Friday sundown through Saturday sundown] we are terminating the process to hire you." ER 52.

efforts to negotiate an accommodation of an employee's religious beliefs, *see Hacienda Hotel*, 881 F.2d at 1512-13, as well as its determination whether an employer could make a reasonable accommodation without incurring undue hardship, *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 908 (9th Cir.1979).

Whether a proposed accommodation would cause undue hardship must be determined in the particular factual context of the case. *See American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir.1986). Ordinarily, the employer must show that the accommodation would cause " 'undue hardship *on the conduct of the business.*' " *Townley Eng'g*, 859 F.2d at 615 (quoting 42 U.S.C. § 2000e(j)). "An accommodation causes an 'undue hardship' when it results in more than a *de minimis* cost to the employer." *Heller*, 8 F.3d at 1440.[11] However, an employer may also show hardship on the plaintiff's co-workers. It is less clear what type of impact on

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[11] The Supreme Court has made it clear that an accommodation that imposes more than a *de minimis* cost to the employer constitutes an undue hardship. *See Ansonia*, 479 U.S. at 66-68, 107 S.Ct. at 371 (stating that in *Hardison*, the Court held that "an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer."). As we have stated, "The statute . . . posits a gain-seeking employer exclusively concerned with preserving and promoting its economic efficiency." *Townley Eng'g*, 859 F.2d at 616. Accordingly, additional costs in the form of lost efficiency or higher wages may constitute undue hardships. *Hardison*, 432 U.S. at 84, 97 S.Ct. at 2276-77.

coworkers, apart from a significant discriminatory impact, constitutes an undue hardship.[12]

Here, the district court concluded that the State entered into good-faith negotiations for the purpose of arriving at an accommodation of Opuku-Boateng's religious beliefs. The court based its conclusion on the fact that the State engaged in negotiations with Opuku-Boateng's representatives and conducted a poll of the Yermo station employees before determining that an accommodation was not feasible. Without relying on the evidence regarding the poll,[13] we agree that the State

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[12] In some of our cases, relying on *Hardison*, we have said that an accommodation that imposes more than a *de minimis* impact on coworkers may also constitute an undue hardship. *See Bhatia*, 734 F.2d at 1384; *Yott*, 602 F.2d at 908; *Burns*, 589 F.2d at 406. However, *Hardison*, as well as *Bhatia*, the only case in which we have considered whether the impact on coworkers constituted an undue hardship, involved accommodations that would have resulted in a significant discriminatory impact on the plaintiff's coworkers. *See Hardison*, 432 U.S. at 80-81, 97 S.Ct. at 2274-75 (finding that accommodation would have deprived coworkers of seniority rights contained in collective bargaining agreement and have resulted in discriminatory treatment); *Bhatia*, 734 F.2d at 1384 (concluding that accommodation would have required coworkers to assume the plaintiff's share of potentially hazardous work); *see also Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 487 (2d Cir.1985) (suggesting that "*Hardison* may be read as equating 'undue hardship' with preferential treatment."), *aff'd on other grounds and remanded*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986). Here, as we explain below, the alleged impact is not only *de minimis* and non-discriminatory but hypothetical.

[13] Ingham's testimony regarding the poll constituted double hearsay, or hearsay upon hearsay: he testified as to what the unknown supervisor who conducted the poll said the

" 'negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs.' " *Heller*, 8 F.3d at 1438 (citation omitted). This is clearly not a case in which the employer did not make an effort to negotiate with the employee. *See id.* at 1440 (collecting cases in which employer made no effort). Indeed, it appears that as a result of week-long negotiations, a church elder arrived at a tentative agreement with the State but that the arrangement later fell through. While the nature of the understanding has been lost with the death of the elder and the failure of the state, for whatever reason, to produce a witness from its side of the discussions, we nevertheless conclude that the State satisfied the first requirement. The threshold for satisfying this requirement is low because, while a negative conclusion results in a violation of the statute, an affirmative conclusion serves only to move the analysis to the next issue: whether the various potential accommodations would all have resulted in undue hardship.

Although the State negotiated in good faith, there is no evidence that it ever made any proposal to Opuku-Boateng. Therefore, the next issue is whether Opuku-Boateng's proposed accommodations would have resulted in undue hardship to the State or his co-workers. As we have noted, the proposed accommodations included excusing him from Sabbath work and scheduling him instead for other equally undesirable shifts, adopting a system of voluntary or mandatory shift trades,

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employees said when they were asked whether they would accommodate Opuku-Boateng. We address later in the opinion whether the results of the poll were properly admitted.

employing a combination of the above procedures, arranging a transfer to another department, and making a temporary accommodation, which would have allowed the State to experiment with the various proposals while permitting both it and Opuku-Boateng to make efforts to find him other employment with the Department or another State agency. The district court rejected all of these proposed accommodations on the ground that each would have resulted in undue hardship both to his coworkers and the Department. We address the district court's conclusions as to the proposed accommodations in turn.

Scheduling Arrangement and/or Shift Trades

The district court concluded that although scheduling Opuku-Boateng to be off every Sabbath was mathematically possible, it constituted an unreasonable accommodation "because it would have had a discriminatory impact on other employees and more than a de minimis impact on the operation of the Yermo station." Specifically, the district court determined that accommodating Opuku-Boateng in this manner would have required a number of other employees to work more than their fair share of Friday night and Saturday day and evening shifts, hampered the Department's ability to accommodate other employees' scheduling needs, resulted in substantial morale problems and additional requests for accommodations, and violated Departmental policy. With respect to a system of voluntary shift trades, which could have been employed either by itself or in combination with modifications to the scheduling system, the district court concluded that any such arrangement

was infeasible because the other station employees were unwilling to trade shifts with Opuku-Boateng on a regular basis.

We conclude that the district court clearly erred in determining that the State established that Opuku-Boateng's proposed accommodations would cause undue hardship; it erred with respect to the purported impact both on Opuku-Boateng's fellow station employees and on the Department's operations. We discuss first the impact on the other employees. We conclude that the State failed to establish that (1) a scheduling arrangement that would have allowed Opuku-Boateng to observe the Sabbath would have discriminated against the other station employees, and (2) a voluntary trade system would have been infeasible.

In determining that the proposed accommodations would result in discriminatory treatment of other employees, the court relied principally on *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). We have not read *Hardison* so broadly as to proscribe all differences in treatment. *Compare Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981) ("Disparate treatment of employees . . . is not necessarily unreasonable.") *with Yott*, 602 F.2d at 908 (stating that "transferring and training Yott appears to constitute preferential treatment over other bargaining unit employees of a substantial nature, contrary to [*Hardison*]. . . . ").[14]

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[14] The Second and Eighth Circuits have interpreted *Hardison* in a similar manner. In *Brown v. General Motors*

Instead, we have read it to bar "*preferential* treatment of employees." *Tooley*, 648 F.2d at 1243.

In *Hardison*, the proposed accommodation would have conflicted with the contractually-established seniority system, thus violating an employee's seniority rights under the collective bargaining agreement by denying him his shift preferences. *Hardison*, 432 U.S. at 80, 97 S.Ct. at 2274-75. By contrast, in this case, the scheduling of shifts was not governed by any collective bargaining agreement, ER 141, and the proposed accommodation would not have deprived any employee of any contractually-established seniority rights or privileges, or indeed of any contractually-established rights or privileges of any kind.[15]

Corporation, 601 F.2d 956, 961 (8th Cir.1979), the Eighth Circuit rejected the district court's conclusion that accommodating the plaintiff was impermissible because it "would in effect discriminate against all employees who did not adhere to [the plaintiff's] religion." *Id.* The court stated, "Such an application of *Hardison* would prove a per se proscription against any and all forms of differential treatment based on religion. . . . Carried to its logical conclusion the [district] court's application of the quoted language [from *Hardison*] would preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)." *Id.* at 961-62; *see Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 487 (2d Cir.1985) ("Differential treatment cannot be equated with privileged treatment. Accepting the school board's argument would 'preclude all forms of accommodation and defeat the very purpose behind § 2000e(j).' ") (quoting *Brown*, 601 F.2d at 962), *aff'd on other grounds and remanded*, 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986).

[15] In *Hacienda Hotel*, we stated that the *Hardison* Court "addressed the degree of accommodation that was required of an employer within the framework of a [collectively bargained]

More important, unlike in *Hardison*, there is no evidence that the proposed shift-scheduling arrangement would, in the end, have granted Opuku-Boateng a privilege or imposed more than a *de minimis* burden on other employees. In *Hardison*, not all TWA employees were required to work weekends. Those employees who had worked in a department the longest had first preference to take weekends off. Requiring another employee with greater seniority to substitute for Hardison on Saturday would have afforded Hardison the privilege of not working Saturday, and imposed the burden of working that day on the other employee, "according to religious beliefs." *Hardison*, 432 U.S. at 85, 97 S.Ct. at 2277.

In this case, by contrast, as the district court concluded, all employees at the Yermo station were required

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seniority system." 881 F.2d at 1513. That the *Hardison* Court was specifically concerned with the duty to accommodate in the context of a collectively bargained seniority system is made clear by the following passage:

> We are . . . convinced . . . that TWA cannot be faulted for having failed to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objection of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement.

Hardison, 432 U.S. at 78-79, 97 S.Ct. at 2274. As the Court itself concluded, "we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." *Id.* at 79, 97 S.Ct. at 2274.

to work "an equal number of undesirable weekend, holiday, and night shifts." ER 141. So long as Opuku-Boateng worked that equal number of "undesirable shifts," being assigned a holiday, Sunday, or night shift for every shift he missed to observe the Sabbath, he would not have been granted any preferential treatment, nor would any cognizable burden have been imposed on other employees who simply were assigned one undesirable shift instead of another. No evidence was offered that the shift assignments could not have been arranged in a manner that would have ensured that Opuku-Boateng and the other employees all received an equal number of undesirable shifts. Therefore, the State failed to carry its burden of demonstrating that Opuku-Boateng's practice of observing the Sabbath could not have been accommodated through scheduling arrangements without affording him preferential treatment.[16] Accordingly, we conclude that the district court clearly erred in determining that the proposed scheduling arrangement would have discriminated against Opuku-Boateng's fellow station employees. *Compare Tooley*, 648 F.2d at 1243 (concluding that exempting the plaintiffs from mandatory union dues and having them pay an equal amount to charity was reasonable because the plaintiffs would suffer the same economic loss as the union member employees) *with Bhatia*, 734 F.2d at 1384 (concluding that accommodation was unreasonable because the plaintiff's "coworkers would be required to assume his share of potentially hazardous work").

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[16] Our analysis is equally applicable with respect to "covering" shift vacancies created by emergencies.

Opuku-Boateng also proposed an alternative means by which the State could accommodate his religious practices without affording him preferential treatment or discriminating against his coworkers. This alternative, voluntary shift trades, could have been implemented by itself or in combination with the proposed scheduling arrangement discussed above.[17] For example, the State could have prepared a six-month or year-long schedule in advance, determined how many Sabbath shifts Opuku-Boateng would ordinarily be assigned, and then determined how many of those shifts his coworkers would be willing to accept in exchange for undesirable Sunday, holiday, or night shifts that they would otherwise have had to work. It is not unreasonable to assume that other employees would have been willing to trade for many, if not all, of Opuku-Boateng's Sabbath shifts in exchange for shifts that they were assigned and might have found even more undesirable. By preparing a tentative schedule, the State might well have determined that voluntary shift trades would completely eliminate the hypothetical difficulty resulting from the need to accommodate Opuku-Boateng's religious beliefs.

The State conceded at oral argument that it had an obligation to investigate whether voluntary trading of shifts was feasible. Relying on the results of a flawed poll of the Yermo station employees, the district court concluded that voluntary shift trades were not feasible. We conclude that the district court erred in relying on those results, and that the State failed to offer any probative

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[17] We note that station employees were generally allowed to trade shifts.

evidence that would demonstrate that a system of voluntary shift trades was infeasible.

Ingham's testimony regarding the results of the poll, if offered for its truth, constituted inadmissible hearsay, for he testified as to what the supervisor who conducted the poll told him the employees said when they were asked about the possibility of accommodating Opuku-Boateng's religious beliefs. *See* Fed.R.Evid. 801(c). Because no hearsay exception applies to the supervisor's statement that the Yermo station employees said that they were not willing to accommodate Opuku-Boateng through voluntary shift trades, the district court properly determined that it could not consider Ingham's testimony for the purpose of establishing the poll results. *See* RT 1003-23 to 1004-1.[18] Notwithstanding this determination, the court subsequently relied expressly on the poll results when determining whether voluntary shift trades were feasible. It stated, "the informal poll taken by defendants

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[18] Polls generally raise complicated hearsay problems because they report what pollsters say the persons polled said. Here, the problem is even greater because Ingham did not conduct the poll. He was reporting what he had been told by the supervisor who conducted the poll. Accordingly, we are not concerned here with the question whether the testimony of the person who conducted the poll would have been admissible. We note, however, that a hearsay poll may be admitted as an exception to the hearsay rule if it is material and more probative on the issue than other evidence, and it has guarantees of trustworthiness. *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 522 (10th Cir.1987); *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir.1978). Here, as we explain more fully below, we seriously question the materiality and reliability of the poll conducted by the State, and find a total absence of guarantees of trustworthiness.

indicated that none of the employees were willing to accommodate [Opuku-Boateng] on a permanent basis, although a few were willing to trade shifts with [him] occasionally." ER 144. To the extent that the district court relied on Ingham's hearsay testimony regarding the results of the poll, it was in error.[19]

The State contends that the district court relied not only on the results of the poll, as recounted by Ingham,

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[19] Even aside from the fact that his testimony was inadmissible as hearsay, Ingham's testimony regarding the poll is not reliable. It reveals a confusion between the oral poll allegedly conducted prior to Opuku-Boateng's termination in 1982 and a subsequent poll conducted in 1983. In describing the 1982 poll, he stated that he wanted the Yermo station employees to be asked whether they "would be willing to trade on an on-going basis with fellow employees that wanted to attend college, employees that wanted a specific day off each week for religious purposes, and the third – I'm sure there was a third [example]. . . . " RT 992-15 to -21. Although Ingham stated that he was not confusing the two polls, his description of the 1982 poll not only differs from the recollection of Lozano, the only other witness who recalled the question asked in the poll, but it is also strikingly similar to the questions posed in the 1983 poll. The 1983 poll, which was taken the year after Opuku-Boateng was denied employment, asked Yermo station employees whether they would accommodate:

> 1. Scheduling employees time off so that they can attend school. . . .
>
> 2. Providing Sunday mornings off to those employees wanting to attend church. . . .
>
> 3. Providing those employees wishing time off sundown Friday evening until sundown Saturday evening each week to meet religious beliefs. . . .

Pl. Exh. 6.

but also on "independent" testimony that the Yermo station employees were not willing to accommodate Opuku-Boateng. Red Brief at 30. We disagree. As a preliminary matter, we see no indication in the record that the district court relied on any "independent" testimony. More important, the testimony in the record does not support the conclusion that the Yermo station employees were unwilling to make a reasonable accommodation. The State draws our attention to Maria Lozano's testimony. RT 462-12 to -25. Her testimony, however, substantially undermines the reliability of the poll itself. Lozano testified that when she was asked whether she would be willing to trade shifts with Opuku-Boateng, it was her belief that he would be unable to work three days per week, not just one twenty-four-hour period. RT 445-15 to -17. Her belief was not simply a mistake on her part. Lozano stated that various supervisors had told her that accommodating Opuku-Boateng's request would involve three days per week. RT 346-11 to -25.[20] Without any evidence to the contrary, we can only assume that the other employees were polled about a three-day accommodation as well.[21] Accordingly, we fail to see how the evidence suggests, let alone establishes, that the Yermo

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[20] Although she was asked about a substantially more burdensome accommodation, Lozano testified that she responded that she would have been willing to trade shifts with Opuku-Boateng "sometimes but not all the time." RT 444-21 to -22.

[21] As the State concedes, Whitacre, who also testified regarding the poll, "could not recall specific details such as the specific nature of the question asked or the number of people contacted." Red Brief at 17.

station employees were collectively unwilling to accommodate Opuku-Boateng by trading shifts with him in a manner that would enable him to observe the Sabbath.

In any event, the evidence conclusively demonstrates the inadequacy of the State's efforts. The State conducted a vague and ambiguous poll that was not capable of producing reliable results regarding the question whether an accommodation was practicable. The issue was not, as the question asked of Lozano, and presumably other employees, implied, whether any one employee would be willing to accommodate Opuku-Boateng's religious beliefs by trading for *all* of his Sabbath shifts. Instead, the issue was whether over the course of a year (or any other fixed period of time) there would be a sufficient number of employees in the station who would agree to work one or more of Opuku-Boateng's Sabbath shifts in exchange for his working one or more shifts assigned to them that they found equally undesirable. *See* ER 141 (district court stating employees were required, on an annual basis, to work an equal number of undesirable weekend, holiday, and night shifts); RT 604-05 (Fred Sandridge stating that supervisors sought to equalize such shifts over "a 12-month period"). The State failed to conduct the type of inquiry into the feasibility of trading shifts that would have been necessary to answer that question one way or the other, and thus to enable it to carry its burden.[22]

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[22] As we explained earlier, a proper investigation of the feasibility of an accommodation would, for example, have first determined the total number of Sabbath shifts Opuku-Boateng would be assigned over the forthcoming year as well as the projected schedules for that period of the other employees. Then, by asking the individuals polled how many specific shifts

Accordingly, we conclude that the district court clearly erred in concluding that an accommodation of Opuku-Boateng's religious beliefs would have been unreasonable, because the State failed to establish that (1) scheduling adjustments by the Department would have discriminated against the other Yermo station employees and (2) those employees would have been unwilling to make voluntary trade shifts that would have accommodated those beliefs. In this connection, we note finally that neither the district court nor the State examined the question how a combination of these two proposals might have worked, had it not been possible to accomplish the accommodation by implementing either one by itself.

Having addressed the district court's conclusions regarding the impact the proposed accommodations would have had on Opuku-Boateng's coworkers, we now consider its conclusions regarding their potential impact on the operation of the station. We conclude that the district court clearly erred in determining that an accommodation involving either a scheduling arrangement or voluntary trading of shifts or a combination of the two would have caused an undue hardship with respect to "the conduct of the employer's business" or any "disruption of its work routine." *See Townley Eng'g*, 859 F.2d at 615 (citations omitted).

The district court determined that even though Opuku-Boateng proposed to work additional Sunday,

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they would be willing to trade with Opuku-Boateng, the State could have determined whether the other employees of the station would collectively have been willing to make the necessary accommodation.

holiday, and night shifts in exchange for not working on his Sabbath, such an accommodation was nonetheless infeasible because it would have resulted in his working a more predictable schedule, in violation of departmental policy. Although the Department had a legitimate interest in varying the work schedules of its border station employees in order to discourage bribery or dishonesty, there is no probative evidence that suggests that accommodating Opuku-Boateng's religious beliefs would have resulted in a schedule that was so predictable (either for Opuku-Boateng or his co-workers) that it would have jeopardized the Department's security interests.[23]

The district court also concluded that the Department's ability to accommodate the scheduling needs of other employees would have been affected and that

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[23] The testimony of Fred Sandridge, a former manager of the Yermo station, suggests that the Department's policy is easily satisfied by a varied work schedule:

> [Opuku-Boateng's counsel:] So . . . your policy basically is just not to have the people necessarily every day, every month, and every year working the same schedule?
>
> [Sandridge:] Right.
>
> [Counsel:] As long as there's some change back and forth so that truckers don't become too acquainted, that satisfies the policy?
>
> [Sandridge:] Yes.

RT 583-17 to -25. Likewise, Ingham stated that the policy was not to allow "fixed shifts where unethical arrangements could be made either with the traveling public or trucking industry." RT 931-18 to -20. *See* RT 864-23 to -24 (Mimi Khan, an assistant director in the Department, stating "you don't want the same person there at the station on an ongoing basis. . . . ").

morale problems with a significant impact could have arisen. We find this conclusion clearly erroneous as well. First, the district court incorrectly based its conclusions on its finding that Opuku-Boateng would be accorded preferential treatment. As we have already explained, this finding was in error. Second, the evidence introduced by the State as to its ability (or lack thereof) to accommodate other employees' scheduling desires was wholly inadequate. Third, hypothetical morale problems are clearly insufficient to establish undue hardship. "Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (1978), *cert. denied in International Ass'n of Machinists and Aerospace Workers AFL-CIO v. Anderson*, 442 U.S. 921, 99 S.Ct. 2848, 61 L.Ed.2d 290 (1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir.1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979).[24] Likewise, the mere possibility that there would be an unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship. *See Burns*, 589 F.2d at 407 (rejecting contention that "accommodating [the plaintiff] would open the gate to excusing vast numbers of persons who claimed to share [the plaintiff's] beliefs," where the record established that only three of the union's members

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[24] Indeed, as we noted in *Anderson*, "If relief under Title VII can be denied merely because the majority of employees, who have not been discriminated against, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." 589 F.2d at 402 (citation and internal quotation marks omitted).

were Seventh Day Adventists).[25] Far more concrete undue hardship is required before an employer can be said to have met its burden. *See Townley Eng'g*, 859 F.2d at 615 ("A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it

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[25] The companion cases of *Burns* and *Anderson*, which post-date *Hardison*, considered the holdings in that case at length. For that reason alone, the dictum in a footnote in *Hardison*, cited by the State at oral argument, does not require a contrary result. In *Hardison*, the Supreme Court, replying to the dissent, mentioned in footnote 15 "the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays." *Hardison*, 432 U.S. at 84 n. 15, 97 S.Ct. at 2277 n. 15. Here, we are dealing with a very small number of employees.

Moreover, as the Eighth Circuit pointed out in *Brown v. General Motors Corporation*, 601 F.2d 956, 961 (8th Cir.1979),

> Our examination of the factual predicate upon which footnote 15 is based reveals that the trial court in *Hardison* found greater than de minimis cost associated with accommodating only Hardison. Thus, our reading of footnote 15 coincides with that expressed by Judge Winter's dissenting opinion in *Jordan v. North Carolina National Bank*, 565 F.2d 72, 78 (4th Cir.1977):
>
> > [I]f it is to be presumed as a matter of law that an employer may be required to do for one employee only what it may do for all employees "without undue hardship," no employer would ever be required to accommodate any religious belief of any employee.

We agree with the Eighth Circuit, as well as with our own holding in *Burns*. Thus, we give little weight to the comment in footnote 15 to which the State refers.

must be supported by proof of 'actual imposition on co-workers or disruption of the work routine.' ") (citation omitted).

Thus, we conclude that the district court erred in determining that the proposed scheduling arrangement, voluntary trade shifts, or a combination of the two, would have resulted in undue hardship.

Temporary Accommodation and Transfer

Finally, Opuku-Boateng proposed a temporary or trial accommodation that would have allowed the Department to experiment with the proposed accommodations and permitted both parties to investigate the possibility that Opuku-Boateng could be employed in another job in the Department or some other State agency, should the accommodations prove infeasible in practice. The district court rejected this suggestion also. We disagree. At the very least, the State should have either temporarily scheduled Opuku-Boateng not to work on the Sabbath or sought to obtain voluntary shift trades for him on a short- or long-term basis.[26] Then, certainly

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[26] Lozano testified that she had used three techniques to accommodate requests for time off. She (1) attempted to schedule the employee to provide the requested day off, (2) provided the employee with shifts that would afford him sufficient time to attend to his personal business, or (3) scheduled the employee to work a desirable shift to enhance his ability to trade with other employees. RT 377-4 to -20. The record indicates quite clearly that temporary accommodations were possible, at least for shifts that were scheduled at a particular time. Lozano, for example, testified that she had accommodated herself and two other inspectors to attend

by the end of his probationary term, it would have been able to determine what actual hardships, if any, would result. Had the State followed this course, it would have placed itself on far firmer ground to argue that Opuku-Boateng could not reasonably be accommodated. *See Burns*, 589 F.2d at 406 ("The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.") (citation and internal quotation marks omitted). Moreover, both Opuku-Boateng and the State would have had the opportunity during that period to attempt to locate another suitable permanent position for him in the Department or elsewhere in State employment.

CONCLUSION

We conclude that Opuku-Boateng established a prima facie case of religious discrimination and that the State failed to demonstrate that he could not be reasonably accommodated without undue hardship. The district court clearly erred in concluding that the State carried its burden of establishing that undue hardship would have resulted from the various accommodations that Opuku-Boateng proposed. The State failed to show that any of the proposed accommodations would have unduly burdened the Department's operations or resulted in discriminatory treatment of the other employees. Accordingly, the judgment of the district court is

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semester-long college courses. RT 377-22 to -25. The record also shows that a Protestant minister who needed Sunday mornings off had been accommodated for a period of ten years.

REVERSED and the case is REMANDED to the district court for the award of appropriate relief.

REVERSED and REMANDED.

SAMUEL P. KING, Senior District Judge, dissenting:

I would affirm the district court for the reasons stated by the district judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KWASI OPUKU-BOATENG, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.	)	CIV. NO. S-87-755 MLS

MEMORANDUM OF DECISION
(Findings of Fact and Conclusions of Law Included)

(Filed Jul. 25, 1994)

This is a religious employment discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq. – "Title VII"). Plaintiff seeks a declaratory judgment that defendant engaged in religious discrimination in violation of Title VII, a permanent injunction enjoining defendant from further engaging in any such discriminatory practices, reinstatement (with appropriate promotions, back pay and other benefits to which he would have been entitled since November 1, 1982), costs of suit and attorney's fees.

Trial was held by the court, sitting without a jury, on April 19 through May 1, 1993, following which the case was taken under submission. On the last day of trial, the court requested post-trial briefing on certain key legal issues in the case. Further oral argument was held on December 10, 1993. For a period of several months, the

parties unsuccessfully attempted to settle the case. Subsequently, the case was resubmitted for decision. Accordingly, having heard and considered all of the admissible evidence, arguments, and written submissions, the court now finds in favor of defendants.

I. The Parties' Contentions.

Plaintiff alleges that: (1) on or about May 22, 1982, he applied for a position as a permanent Plant Quarantine Inspector ("PQI") with the California Department of Food and Agriculture ("CDFA"); (2) on October 18, 1982, he was appointed by defendants as a permanent PQI at CDFA's border inspection station in Yermo, California; (3) prior to his hire, plaintiff had implicitly notified defendants that his religious beliefs (Seventh Day Adventist) prevented him from working on his Sabbath, which extended from sundown Friday to sundown Saturday; (4) upon receiving the appointment, plaintiff quit his temporary position as a grain inspector for the CDFA and reported to the Yermo station for work; (5) upon arriving at the Yermo station, plaintiff discovered that he was scheduled to work on a Saturday, and he told his supervisor that he would be unable to work on those days due to his religious beliefs; (6) based on his refusal to work Saturdays, defendants revoked plaintiff's appointment on November 8, 1982, without making any attempt to accommodate his religious beliefs; and (7) defendants' failure to accommodate plaintiff's religious beliefs, despite their ability to do so and plaintiff's willingness to cooperate in such accommodation, violated Title VII's prohibition against religious discrimination in employment.

Defendants, on the other hand, assert that their actions were not unlawful because they did attempt to accommodate plaintiff's religious beliefs, but could not do so successfully without suffering an undue hardship. Alternatively, defendants contend that: (1) their conduct was justified by a business necessity; and/or (2) the requirement that plaintiff be available to work on Saturdays was a "bona fide occupational qualification" for the PQI position.

II. Findings of Fact.

The following is a chronological discussion of the events giving rise to plaintiff's claim for relief. This discussion outlines both general undisputed facts and those disputed facts that the court has found were proven by a preponderance of the evidence at trial. Specific facts pertaining to the parties' various claims and defenses are set forth in subsequent sections of this opinion.

Plaintiff is a devoutly religious member of the Seventh Day Adventist ("SDA") Church. As a practicing SDA, his Sabbath is from sundown Friday to sundown Saturday.[1] The SDA Church teaches that it is morally wrong to perform secular work on Saturdays and that repeated violation of this teaching could place the salvation of one's soul in jeopardy. Plaintiff adopted this belief as a young child and has never worked a Saturday in his life. As a result of this sincerely held religious belief, he

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[1] For the sake of convenience, the period of plaintiff's Sabbath will hereafter be referred to as "Saturday," although it technically includes Friday night as well.

refuses to work on Saturdays under any circumstances, even in an emergency.

In the Summer of 1982, plaintiff obtained a temporary position as a grain inspector for the CDFA. Due to the nature of his employment and the working hours, he was not required to work Saturdays while in this position. Also in the summer of 1982, plaintiff applied for a position as a PQI with the CDFA after observing an announcement for that job. At the bottom of the announcement, a section entitled "Special Personal Requirements" stated that applicants must be willing "to work holidays, Sundays, and odd hours. Pl.'s Ex. 1.

In order to be considered for the PQI position, plaintiff was required to take a written civil service examination for the PQI classification. Successful applicants were then scheduled for an oral interview, which was weighted 100%.[2] The application form for the examination asked each applicant to "indicate if your religious beliefs prevent you from taking an examination on Saturday." Pl.'s Ex. 3. Plaintiff answered "yes" to this question. Nevertheless, plaintiff subsequently received a notice that he was scheduled to take the examination on a Saturday. Plaintiff immediately called Ms. Diane Jones Sheff, whose name appeared on the notice, and told her that he could not take the examination on Saturday. Ms. Sheff confirmed that plaintiff had checked the appropriate box on the

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[2] Passage of the written civil service examination for the PQI classification enabled applicants to be hired for the PQI position only. Successful applicants could not be hired into any other CDFA position without passing another civil service examination for the appropriate classification.

application form, and then made arrangements for the examiner to stay overnight so that plaintiff could take the test on Sunday.

Plaintiff later received notice that he had passed the written examination and that he was scheduled for an oral interview. He was subsequently interviewed by Ms. Sheff and a Mr. Chuck Gray, an Exclusion Biologist in CDFA's Plant Industry Division. During the interview, plaintiff did not inquire about the working hours of the job, nor did he indicate that his religious beliefs prevented him from working on Saturdays. The interviewers also did not discuss working hours, nor did they inquire about plaintiff's religious beliefs. Plaintiff assumed that, because he had indicated that he was unable to take the written civil service examination on Saturday because of his religious beliefs, this operated as sufficient notice of his inability to work on Saturdays. Mr. Gray testified that he was legally prohibited from discussing religious beliefs at an interview with a job applicant.

Sometime after the interview, plaintiff spoke with Mr. Gray one or more times over the telephone. Mr. Gray asked plaintiff at which station he would prefer to work, and plaintiff told him that any station in the state was acceptable. When Mr. Gray cautioned plaintiff that some stations did not have very desirable living accommodations, he responded that he was not concerned with the living conditions, but only with whether there was an SDA Church nearby. Again, plaintiff did not inquire about working hours or inform Mr. Gray of his inability to work on Saturdays.

On October 18, 1982, plaintiff received notice that he had been appointed as a permanent PQI at the border inspection station in Yermo, California, commencing November 2, 1982. Pl.'s Ex. 5. This station employed a total of fifteen persons, five of whom were supervisors. Like all border inspection stations in California, Yermo operates twenty-four hours a day, seven days a week. Consequently, the employees are subject to varied scheduling and are regularly required to work on evenings, weekends and holidays.[3] Although plaintiff was aware of this job requirement, he assumed that he would be able to work out any scheduling problems in advance with CDFA, as he had been able to do in the past. Plaintiff accordingly terminated his temporary position as a grain inspector, purchased the required uniforms, and made arrangements to move himself and his family to Yermo.

Plaintiff arrived at the Yermo inspection station with the local SDA pastor on October 28, 1982. He observed the posted work schedule and discovered that he was scheduled to work on the third Saturday in November. Plaintiff then informed the acting supervisor, Mr. Whitacre, that because he was an SDA, he was unable to work on Saturdays. Mr. Whitacre told plaintiff that unless he was willing to work on Saturdays, his hiring papers would not be processed. Plaintiff then left the station and informed Mr. Gray via telephone about what had just occurred. At first, Mr. Gray agreed with Mr. Whitacre and said that if plaintiff refused to work on Saturdays, then he could not work at the station. However, Mr. Gray then

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[3] The PQI position is the only job in CDFA that requires employees to be available to work at all times.

reconsidered and told plaintiff that he would have to take the matter up with his supervisor.

Plaintiff and representations from the local SDA Church subsequently entered into negotiations with various CDFA personnel. During these negotiations, plaintiff offered to work extra odd hours on Sundays, evenings and holidays, to arrange voluntary shift trades with other employees, and to be transferred to another border inspection station or another position in CDFA. Howard Ingham, Pest Exclusion Program Supervisor in CDFA's Plant Industry Division, conducted an oral poll of the employees at the Yermo inspection station to determine whether any of them would be willing to trade shifts with plaintiff on a regular basis. Although one or two employees said they would be willing to do so on rare occasions, none were willing to accommodate plaintiff permanently.

On November 1, 1982, Mr. Ingham wrote to plaintiff and informed him that if he wanted to be a PQI, he was "expected to work assigned shifts as scheduled." Pl.'s Ex. 6. On November 3, 1982, plaintiff filed a complaint of religious discrimination with the State Personnel Board. Pl.'s Ex. 8. By November 8, 1982, the negotiations had broken down, and that same day, Mr. Ingham again wrote to plaintiff and informed him that CDFA was unable to process his appointment as a PQI because he was unable to meet the job requirement of being "available to work frequently from Friday sundown through Saturday sundown." Pl.'s Ex. 9.

Plaintiff attempted to reacquire his position as a grain inspector but was told that the position had already

been filled. He then filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued an administrative determination that there was reasonable cause to believe that defendants had engaged in religious discrimination in violation of Title VII. Plaintiff then exhausted his administrative remedies and was issued a 90-day notice of right to sue by the United States Department of Justice.

III. Applicable Law and Legal Analysis.[4]

A. "Burden of Proof" in Religious Accommodation Cases.

Plaintiff's Title VII religious discrimination claim is premised on section 703(a)(1) of Title VII, which provides:

> (a) It shall be an unlawful employment practice for an employer
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> > (1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . .

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[4] As an initial matter, the court notes that recently the United States Supreme Court has held that certain provisions of the Civil Rights Act Amendments of 1991 cannot be retroactively applied to "pre-enactment conduct." *Landgraf v. USI Film Prods.*, ___ U.S. ___; 114 S. Ct. 1483, 1508 (1994); *Rivers v. Roadway Express, Inc.*, ___ U.S. ___; 114 S. Ct. 1510, 1519-20 (1994). However, this case does not implicate any provision of the Civil Rights Act Amendments of 1991 and therefore the retroactive application of that act is not in issue.

42 U.S.C. § 2000e-2(a)(1). "Religion" is defined in section 701(j) as:

> all aspects of religious observance and practice, as well as belief, *unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.*

42 U.S.C. § 2000e(j) (emphasis added).[5] The emphasized clause was added by the Civil Rights Act Amendments of 1972, and was intended to incorporate the substance of the 1967 EEOC Guidelines.[6] *Anderson v. General Dynamics Convair Aerospace Divn.*, 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). "The intent and effect of

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[5] A literal reading of this section would require a court to conclude that, if an employer cannot accommodate an employee's religious practice without suffering undue hardship, then the employee's belief does not meet the definition of religion and is therefore not even subject to Title VII. However, this is not how the courts have construed this section. Rather, they have ignored the effect of Congress' "somewhat awkward[ ]" placement of a duty to accommodate in the definition of religion and essentially have construed the emphasized accommodation clause as a separate section. *Ansonia Board of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986).

[6] These Guidelines provided, *inter alia*, that an employer had an obligation under section 703(a)(1) "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations [could] be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b), 32 Fed Reg. 10298 (1967). Section 1605.1(c) of the 1967 EEOC Guidelines further placed upon the defendant employer the "burden of proving that undue hardship render[ed] the required accommodations to the religious needs of the employee unreasonable."

[the section 701(j)] definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

The Ninth Circuit has "read sections 703(a) and 701(j) as creating a two-part framework in religious practice cases." *E.E.O.C. v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610, 614 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). Under this framework, the plaintiff must first plead *and* prove a prima facie case of religious discrimination by a preponderance of the evidence. *Anderson*, 589 F.2d at 401; *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1475 (9th Cir. 1986); *cf. St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). Second, "after the plaintiff has made out a prima facie case, the burden shifts to the employer '*to prove* that [it] made good faith efforts to accommodate [the employee's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that [it was] unable reasonably to accommodate his beliefs without undue hardship.' " *Townley*, 859 F.2d at 614, quoting *Anderson*, 589 F.2d at 401 (emphasis added); see also *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1512 (9th Cir. 1989) ("once the employee has established a prima facie case, the burden shifts to the employer to prove that it made good faith efforts to accommodate the employee's religious beliefs"); *Proctor*, 795 F.2d at 1475 (same); *American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 775-76 (9th Cir. 1986) (same); *Bhatia v.*

Chevron U.S.A., Inc., 734 F.2d 1382, 1383 (9th Cir. 1984) (same).[7]

The parties disagree as to how the second prong of this two-part test for religious accommodation cases is to be applied. Defendants argue that once the plaintiff makes out a prima facie case, only the burden of going forward with evidence (i.e. the burden of production) shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship. Plaintiff, on the other hand, argues that the entire burden of persuasion shifts to the employer.

The court acknowledges that the case law's consistent use of the phrase "the burden shifts to the employer to prove" is less than clear, for the term "burden of proof" may refer either to the burden of production or the burden of persuasion.[8] However, when read in context,

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[7] As discussed *infra*, contrary to defendants' assertion, this two-part framework is to be distinguished from the three-part analytical framework applied in traditional disparate treatment employment discrimination cases under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court held that, once the employee makes out a prima facie case of intentional discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets this burden, then the burden shifts back to the employee to show that this articulated reason is merely a pretext for intentional discrimination. *Id.* at 802-04.

[8] Black's Law Dictionary defines "burden of proof" as:

> a term [that] has been used to mean either the necessity of establishing a fact, that is, the burden of persuasion, or the necessity of making a prima facie showing, that is, the burden of going forward.

the Ninth Circuit's use of that term clearly implies that the latter meaning was intended. As the court stated in *Anderson*:

> [t]he critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson, 589 F.2d at 399. The court went on to hold that the defendants were required to accommodate the plaintiff's religious practices:

> absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. . . . Both by stipulations of fact and by evidence introduced at trial, Anderson established his prima facie case.
>
> The burden was thereafter upon the employer and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship.

Id. at 400-01. Based on this language, it is reasonable to conclude that the entire burden of persuasion shifts to the employer to show that it could not accommodate the plaintiff's religious beliefs without undue hardship.

Indeed, were the court to conclude otherwise, this would eviscerate the Ninth Circuit's two-part analytical framework for religious accommodation cases and transform it into the three-part framework used in traditional

disparate treatment cases under *McDonnell Douglas*. If the employer bore only the burden of production, a third analytical step would necessarily be required because the employer's discharging of its burden would shift the burden of production back to the plaintiff, where it would merge with the plaintiffs ultimate burden of persuasion. *See Texas Dep't of Commun. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

It is true that the two-pronged test and accompanying allocation and order of proof in religious accommodation cases is a somewhat radical change from the three-pronged approach in traditional disparate treatment cases. However, the two-pronged analysis is consistent with the purpose of section 701(j); that is, to impose on the employer a "statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship." *Hardison*, 432 U.S. at 75. Thus, under section 701(j), the ultimate question of fact in a religious accommodation case, unlike in a traditional disparate treatment case, is not whether the employer intentionally discriminated against the employee, but whether the employer could not have reasonably accommodated the employee without suffering undue hardship, regardless of whether the adverse treatment of the employee was motivated by discriminatory intent.[9] This question is analogous to a typical affirmative defense, as to which the asserting party bears the

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[9] Of course, in such cases, intent may be relevant to the question whether the employer initiated a good faith effort to accommodate the employee's religious beliefs. *Proctor*, 795 F.2d at 1477.

burden of persuasion. *Cf. Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642, 670 (1989) (Stevens, J., dissenting) (observing that the business necessity justification in a disparate impact case is a "classic example of an affirmative defense"). Moreover, the employer is in a better position to prove that it would suffer undue hardship than the employee is to prove that such hardship would *not* be sustained. *Cf.* House Comm. Rept. No. 102-40(II), H.R. 1 (Civil Rights Act Amendments of 1991), reprinted in 2 U.S. Code Cong. & Admin. News, 102nd Cong., 1st Sess. (1991), Leg. Hist, p. 699-700 (explaining similar justification for placing the burden on the employer in a disparate impact case to persuade the court that there was a business necessity for the discriminatory employment practice).

Finally, the practice of placing the burden of persuasion on the employer to demonstrate that its facially discriminatory conduct was justified is not unprecedented in employment discrimination cases. As alluded to above, this approach has also been employed in disparate impact cases both prior to the Supreme Court's decision in *Wards Cove* and subsequent to enactment of the Civil Rights Act Amendments of 1991, which overruled Wards Cove. *See* House Com. Rept. No. 102-40(II), H.R. 1 (Civil Rights Act Amendments of 1991), reprinted in 2 U.S. Code Cong & Admin. News, 102nd Cong., 1st Sess. (1991), Leg. Hist., p. 698-99. In a disparate impact case, similar to a religious accommodation case, once the plaintiff establishes a prima facie case, the employer bears the burden of persuading the court that the discriminatory employment practice was justified by a business necessity. *Id.; Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32

(1971). In fact, Congress itself has recognized that religious accommodation cases are analogous to disparate impact cases in this respect. *See* House Com. Rept. No. 102-40(II), H.R. 1 (Civil Rights Act Amendments of 1991), reprinted in 2 U.S. Code Cong. & Admin. News, 102nd Cong., 1st Sess. (1991), Leg. Hist., p. 701 (citing section 701(j) as an example of a statute which places the burden of persuasion on the employer to demonstrate that its otherwise discriminatory actions were justified).

Defendants argue that interpreting section 701(j) to place the burden of persuasion on the employer runs afoul of the Supreme Court's recent opinion in *St. Mary's Honor Center*, 113 S. Ct. 2742, a traditional disparate treatment case applying the McDonnell Douglas approach. In *St. Mary's Honor Center* the Court held that, while the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its adverse employment action, the ultimate burden of persuading the court that the employer was motivated by intentional discrimination remains at all times with the plaintiff. *Id.* at 2747. However, *St. Mary's Honor Center* is inapposite because, as discussed *supra*, the appropriate allocation of the burdens of production and persuasion in traditional disparate treatment cases is distinct from that of religious accommodation cases, in which intent usually is not an issue.[10]

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[10] However, in the rare case where the plaintiff is asserting a traditional disparate treatment religious discrimination claim (as opposed to a religious accommodation claim), intent is directly in issue. In such circumstances, the three-part *McDonnell Douglas* test applies. *See* Schlei and Grossman, *Employment Discrimination Law*, 1983, p. 242 ("[a]lthough there

Defendants' argument that Federal Rule of Evidence 301[11] mandates the conclusion that only the burden of production shifts is also unpersuasive, for two reasons. First, this rule only deals with the effect of presumptions in civil proceedings. Defendants do not contend that any kind of presumption is at issue here. Second, Rule 301 only operates "in civil actions and proceedings not otherwise provided for by Act of Congress." Title VII's section 701(j) qualifies as an "Act of Congress" that takes religious accommodation cases out of the rubric of Rule 301.

In sum, in religious accommodation cases, the court must determine whether the plaintiff has established by a preponderance of the evidence a prima facie case of failure to accommodate his religious beliefs, and if so, whether the defendant has proven by a preponderance of the evidence that it cannot reasonably accommodate the plaintiff's religious beliefs without suffering undue hardship.

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have been surprisingly few disparate treatment religious discrimination cases under Title VII. . . . [t]he order and allocation of proof in [such] cases[s] . . . follow traditional disparate treatment proof principles").

[11] Federal Rule of Evidence 301 provides:

> [i]n all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

B. Plaintiff's Prima Facie Case.

In order to establish a prima facie case of failure to accommodate, a plaintiff must plead and prove that: (1) he had a bona fide religious belief; (2) he informed his employer of his religious belief and that it conflicted with his responsibilities as an employee; and (3) he was threatened with or subjected to discriminatory treatment, such as discharge, for his inability to fulfill the disputed job requirements or duties. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Hacienda Motel*, 881 F.2d at 1512.

The facts relevant to plaintiff's prima facie case are essentially undisputed. With respect to the first prong of his prima facie case, defendants concede that plaintiff's religious beliefs are bona fide. *See* Ex. A to Superseding Final Pretrial Order, Undisputed Facts, ¶ 2. As to the third prong, there is no dispute that plaintiff was discharged for his "inability to fulfill [his] job duty," *see Hacienda Hotel*, 881 F.2d at 1512.[12] *See* Pl.'s Exs. 6 and 9

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[12] Some case law suggests that plaintiff should be required to show that he was discharged because of his *religious beliefs*, not simply because he refused to comply with the offending job requirements. *Compare Townley*, 859 F.2d at 614 n.5 (stating that the employee must show that he "was penalized in some way because of the conflict" between his religious views and the employment policy at issue) and *Proctor*, 795 F.2d at 1475 (stating that the employee must show that he "was discharged because of [his] observance of [his religious] belief").

However, the court concludes that plaintiff has satisfied this arguably stricter test (which is actually more a matter of semantics than substance). There is no dispute that plaintiff was discharged solely because of his refusal to work on Saturdays, which was part and parcel of his religious beliefs. *See* Pl.'s Exs. 6 and 9.

(letters from Mr. Ingham to plaintiff, dated November 1 and November 8, 1982, which state that, unless plaintiff was willing to work on Saturdays, his hiring papers would not be processed).

Likewise, regarding the second prong of plaintiff's prima facie case, it is undisputed that, immediately upon learning that he was scheduled to work on a Saturday, plaintiff explicitly notified defendants of his inability to work on these days due to his religious beliefs. However, defendants argue that this notice was legally insufficient because it did not occur until after plaintiff was appointed and reported to work at the Yermo station. Plaintiff counters that there is no requirement in the case law that notice be given prior to hire. In addition, plaintiff asserts, even assuming that notice must be given prior to hire, he implicitly gave such notice by indicating that he could not take the PQI examination on a Saturday and by informing Mr. Gray that he was an SDA.

The court agrees with plaintiff that notice need not be given prior to hire in order to establish a prima facie case of religious discrimination based on failure to accommodate religious beliefs. None of the cases addressing the issue of sufficiency of notice state or imply that timing is a significant factor in the employee's ability to establish a prima facie case. Indeed, in several cases, a prima facie case was established despite the fact that the employee did not notify the employer of his religious beliefs until after he was hired. *See, e.g., Hardison*, 432 U.S. at 66-67; *Proctor*, 795 F.2d at 1473. Although in both of these cases, unlike the instant case, the employee plaintiffs had not become members of their particular faith until after they were hired (and therefore could not previously have

given notice), this is not a significant distinguishing factor because in those cases as well as the instant case, the same duty of accommodation was suddenly imposed on the employer. Furthermore, the courts have been fairly liberal in holding that an employee's notice is sufficient to satisfy his prima facie case. *See, e.g., Heller*, 8 F.3d at 1439 (noting that *Wessling v. Kroger Co.*, 554 F. Supp. 548 (E.D. Mi. 1982) is the only case to find that an employee's notice was inadequate to establish a prima facie case). Thus, the court rejects defendants' argument that plaintiff's notice was legally insufficient to satisfy the second prong of his prima facie case.[13]

For the foregoing reasons, the court concludes that plaintiff has established by a preponderance of the evidence a prima facie case of unlawful failure to accommodate his religious beliefs.

C. Reasonable Accommodation/Undue hardship.

Because plaintiff has made out a prima facie case, the burden now shifts to defendants to persuade the court that they could not reasonably have accommodated plaintiff without suffering an undue hardship. *See American Postal Workers*, 781 F.2d at 775. "The determination of when the 'reasonable accommodation' requirement has been met, and the circumstances under which a particular

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[13] Plaintiff's failure to give early notice of his religious beliefs *is* relevant, however, to the reasonable accommodation analysis. See *infra*.

accommodation may cause 'undue hardship' " are questions of fact reviewed under the "clearly erroneous" standard. *Id.; Yott v. North American Rockwell Corp.*, 602 F.2d 904, 908 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). These determinations "must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case." *Anderson*, 589 F.2d at 400; *see also Yott*, 602 F.2d at 908, *quoting Redmond v. GAF Corp.*, 574 F.2d 897, 902 (7th Cir. 1978) (the reasonable accommodation/undue hardship analysis essentially "comes down to a determination of 'reasonableness' under the unique circumstances of the individual employer-employee relationship"). Each prong of the reasonable accommodation/undue hardship analysis is addressed separately below.

1. Reasonable accommodation.

In general, once an employee has established a prima facie case, the burden shifts to the employer to prove that it took "some initial steps to reach a reasonable accommodation of the particular religious belief at issue." *American Postal Workers*, 781 F.2d at 776; accord *Burns v. Southern Pacific Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). "[A]t a minimum, the employer must negotiate with the employee in an attempt to work out a reasonable accommodation." *Heller*, 8 F.3d at 1440. The fact that an employee applies for a job which he knows requires work on his Sabbath does not exempt the employer from this duty of accommodation. *Proctor*, 795 F.2d at 1476. Whether the employer

initiated good faith efforts to accommodate an employee's religious beliefs is a question of fact. *Id.*; *Hacienda Hotel*, 881 F.2d at 1512.

If the employer's efforts at accommodation "fail[-] to eliminate the affected employee's religious conflict, the employer must implement an alternate accommodation proposed by the employee, unless the employer proves that the accommodation would cause [it] 'undue hardship'." *American Postal Workers*, 781 F.2d at 776; *Anderson*, 589 F.2d at 401; *see also Burns*, 589 F.2d at 406 ("[o]nce the employer has made more than a negligible effort to accommodate the employee [citation omitted] and that effort is viewed by the employee as inadequate, the question becomes whether the further accommodation requested would constitute 'undue hardship' ").[14] If,

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[14] Defendants correctly note that in more recent cases, the Ninth Circuit has held that the employer need not actually have attempted an accommodation before claiming undue hardship. See *Heller*, 8 F.3d at 1440; *Hacienda Hotel*, 881 F.2d at 1512; *Townley*, 859 F.2d at 614-15. In *Townley*, the court explained:

> [i]f an employer can show that *no* accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act [of accommodation] (citation omitted). The language in our cases merely emphasizes that the burden of attempting an accommodation rests with the employer rather than the employee. When an employer does not propose an accommodation, or when its proposed accommodation does not eliminate the employee's religious conflict, *the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship.*

895 F.2d at 614-15 (emphasis added). However, in this case, defendants did make an initial good faith attempt to

however, the accommodation proposed by the employer effectively eliminates the employee's religious conflict while preserving his job status, "the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. . . . [T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship." *Ansonia Bd. of Educ. v, Philbrook*, 479 U.S. 60, 68-9 (1986); *accord, Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988).

In this case, defendants do not contend that they offered plaintiff a reasonable accommodation that would have eliminated his religious conflict, so the pertinent question is whether defendants made a good faith initial attempt to accommodate plaintiff's religious beliefs. The court concludes that such an attempt was made. Defendants engaged in negotiations with plaintiff and representatives from the local SDA church for approximately ten days before they determined that a reasonable accommodation was infeasible. During that time, defendants conducted a poll of Yermo station employees to determine whether any of them would be interested in trading shifts with plaintiff on a regular basis. At one point, Elder Neufeld, the local SDA pastor, even called plaintiff's attorney and informed him that an accommodation had been worked out (although this offer later fell through).

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accommodate plaintifff's religious beliefs (see *infra*). Thus, there is no question that they are entitled to assert undue hardship.

The court acknowledges that defendants' conduct was less than exemplary. But perfect conduct is not required. All that is necessary is that defendants made "more than a negligible" effort to accommodate plaintiff. *See Burns*, 589 F.2d at 406. Furthermore, in analyzing defendants' conduct, it must be remembered that plaintiff did not explicitly inform defendants of his unwillingness, *under any circumstances*, to work Saturdays until he arrived at Yermo station a mere *three days* before he was to report for work. This put defendants in an awkward position and allowed them virtually no time within which to work out an accommodation, which doubtless can be a very time-consuming process.

Therefore, the court finds that, in light of all the circumstances, defendants made a good faith initial attempt to accommodate plaintiff's religious beliefs. Thus, the key remaining question is whether further attempts to accommodate plaintiff would have imposed an undue hardship on defendants.

Defendants argue that the court should not reach this question because plaintiff's failure to cooperate in the accommodation process vitiated their duty to accommodate him further. The Ninth Circuit has "recognized the existence of a concomitant duty on the part of an employee to cooperate in reaching an accommodation under section 701(j)." *American Postal Workers*, 781 F.2d at 777. As the court stated in *Yott*:

> [a]n employee cannot shirk his duties to try to accommodate himself or to cooperate with his employer in reaching an accommodation by a mere recalcitrant citation of religious precepts. Nor can he thereby shift all responsibility for

> accommodation to his employer. Where an employee refuses to attempt to reach a reasonable accommodation, he may render an accommodation impossible.

Yott, 602 F.2d at 908.

However, in this case, plaintiff did cooperate in the accommodation process by agreeing to work extra Sunday, holiday, and night shifts, to arrange for shift trades, and to transfer to another border inspection station or another position in CDFA. Therefore, defendants must demonstrate that each of these proposed accommodations would have caused them to suffer undue hardship.

2. Undue hardship.

Unfortunately, neither Congress nor the EEOC have articulated "the kinds of circumstances under which a particular accommodation may cause hardship that is 'undue'." *Anderson*, 589 F.2d at 400; *see also American Postal Workers*, 781 F.2d at 775. However, in *Hardison*, 432 U.S. 63, the governing landmark religious accommodation case (and a case factually similar to the one at bar), the United States Supreme Court developed standards governing the undue hardship inquiry. In that case, plaintiff was employed in the "Stores Department" of Trans World Airlines ("TWA"), which operated twenty-four hours a day, seven days a week. Scheduling of shifts was accomplished pursuant to a seniority system contained in a collective bargaining agreement between TWA and the local machinists' union. Sometime after he was hired, plaintiff became a member of the Worldwide Church of God, which prohibits secular work from sundown Friday

to sundown Saturday, and on specified religious holidays. Subsequently, plaintiff was assigned to work the day shift. He had insufficient seniority to bid for another shift that would have enabled him to have his Saturdays off, and TWA was unwilling to arrange a shift or job exchange for him because this would have violated the seniority provisions of the collective bargaining agreement. TWA also rejected plaintiff's proposal to work only four days a week or to replace him with someone from another shop, since he was the only person available to work in the position on weekends, that position was essential to the airline's operations, and to employ someone from another shop would have left that shop understaffed and/or would have required TWA to pay that person premium wages. TWA did offer to assign plaintiff to twilight shifts, but he rejected that offer because it would have required him to work past sundown on Fridays. When a mutually agreeable accommodation was not reached, plaintiff refused to report for work on Saturdays, and consequently was discharged for failing to work his designated shift.

Plaintiff then brought suit for violation of section 703(a) and 701(j) of Title VII. After a bench trial, the district court entered judgment in defendant's favor. On ultimate appeal to the Supreme Court, the judgment was affirmed. The Court first rejected plaintiff's contention that 701(j) required TWA to violate the collective bargaining agreement by arranging for a shift exchange with more senior employees. The Court reasoned that:

> [w]e agree that neither a collective-bargaining contract nor a seniority system may be

> employed to violate the statute [footnote omitted], but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. . . . Had TWA . . . circumvented the seniority system by relieving Hardison of Saturday work. . . . it would have done so only at the expense of others who had strong, but perhaps non-religious, reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed a Saturday Sabbath.
>
> Title VII does not contemplate such unequal treatment. . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, to prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Hardison, 432 U.S. at 79-81.

The Court also rejected plaintiff's contentions that TWA should have allowed him to work a four day week and/or replaced his shift with other available employees through payment of premium wages, on the ground that these accommodation options would have involved increased costs to TWA "either in the form of lost efficiency in other jobs or as higher wages." *Id.* at 84. The Court held that "to require TWA to bear more than a *de*

minimis cost in order to give Hardison Saturdays off is an undue hardship." *Id.* The Court further explained that:

> to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. [Requiring] TWA [to] incur certain costs in order to give Hardison Saturdays off . . . would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs. . . .

Id. at 84-85. The Court concluded its opinion by stating that "[i]n the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *Id.* at 85.

Applying the relatively lenient *Hardison* standard to the instant case (see *Yott*, 602 F.2d at 909 ("a standard less difficult to satisfy than the 'de minimis' standard for demonstrating undue hardship is difficult to imagine")), the court concludes that defendants have satisfied their burden of demonstrating by a preponderance of the evidence that they could not have reasonably accommodated plaintiff's religious needs without discriminating against other employees, according preferential treatment to

plaintiff, or incurring more than a *de minimis* cost (either in terms of higher wages or lost efficiency).[15] As explained below, each of the possible accommodations suggested by plaintiff is unreasonable, and would have resulted in undue hardship.

Plaintiff first suggests that defendants could have accommodated him through a combination of scheduling arrangements (including scheduling him for more Sunday, holiday and night shifts) and voluntary or mandatory shift "trades." However, there are a variety of reasons why this accommodation option would have resulted in undue hardship to defendants, as well as to other employees.

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[15] The court disagrees with plaintiff that *Hardison* "applies only to a situation where . . . a seniority provision contained in [a] collective bargaining agreement is affected by the available accommodations." Pl.'s Post-Trial Brief at 26:10-13. Rather, as the above quotations illustrate, the *Hardison* Court repeatedly proscribed any unequal treatment among co-workers in the effort to accommodate an employee's religious beliefs. Moreover, subsequent Ninth Circuit cases have interpreted *Hardison* in this manner. *See, e.g., Hudson,* 851 F.2d at 265 (a reasonable accommodation must not adversely impact other employees); *Bhatia,* 734 F.2d at 1384 (an employer may prove that an employee's accommodation proposal would involve undue hardship by showing that its impact on co-workers would be more than *de minimis*); *Tooley v. Martin-Marietta Corp.,* 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied,* 454 U.S. 1098 (1981) ("the religious accommodation provisions do not authorize preferential treatment of employees"); *Yott,* 602 F.2d at 908 ("where the impact on co-workers is greater than *de minimis,* undue hardship is demonstrated"); *see also* Larson, Arthur; *Employment Discrimination,* Vol. 3, § 92.12(b), Matthew Bender, 1994.

As an initial matter, although scheduling at the Yermo station was not governed by a collective bargaining agreement or other formal seniority system at the time of plaintiff's hire, numerous other considerations constrained the station manager's discretion in scheduling to the same or a similar extent as a collective bargaining agreement would have. A number of state and federal laws and policies in effect in 1982 and the years following required employees at border inspection stations to: (1) work a maximum of forty hours a week and a maximum eight hour shift; (2) have two consecutive days off each week; (3) work an equal number of total shifts on a monthly and an annual basis and an equal number of undesirable weekend, holiday, and night shifts; and (4) work unpredictable and varying schedules in order to avoid the possibility of collusion and to enable them to understand different traffic patterns. State policies also required station managers to ensure that there was adequate staffing to cover for employees who were out ill, on vacation, etc. Scheduling options were further limited by the fact that, in 1982, Saturdays were the second heaviest traffic days of the week (following Sundays and holidays). Therefore, border inspections stations were required to have a full complement of staff on those days. Adequate staffing was particularly crucial during peak times of year, such as summers and holidays, when Saturdays were even busier. Finally, in 1982 there were only fifteen permanent, full-time staff members at the Yermo station (five of whom were supervisors), further limiting the available options for scheduling.

In light of the above requirements, scheduling plaintiff to be off every Saturday (although perhaps *mathematically* possible), was nevertheless an unreasonable accommodation because it would have had a discriminatory impact on other employees and more than a *de minimis* impact on the operation of the Yermo station. Accommodating plaintiff in this fashion would have affected between four and eight shifts (depending upon the time of year). This would have unlawfully required many other employees to work more than their fair share of Saturdays and Friday night graveyard shifts (shifts which most employees preferred to have off), in violation of state policy, in order to cover for plaintiff's inability to work during those times. *Cf. Bhatia*, 734 F.2d at 1384 (upholding judgment in favor of employer on the ground that assigning plaintiff duties that did not involve exposure to toxic gas would have required plaintiff's coworkers to assume his share of potentially hazardous work). This discriminatory impact on other employees would have been particularly pronounced given the small size of the available work force at the Yermo station.[16] Alternatively, accommodating plaintiff would have required defendants to incur more than a *de minimis* cost by ordering a temporary employee to fill in for plaintiff on Saturdays and paying him the appropriate overtime compensation, or by operating shorthanded on one of the busiest days of the week, in violation of state policy. Under either scenario, defendants would have been

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[16] If plaintiff were ever promoted to a supervisor position, this would have had an even greater impact because there were very few supervisors available to cover for another supervisor.

required to allocate "the privilege of having Saturdays off . . . according to religious beliefs," contrary to *Hardison*, 432 U.S. at 85.

By the same token, because plaintiff refused to work on Saturdays *under any circumstances*, he would have been unavailable on these days to assist in an emergency or to cover for other employees who happened to be out ill, on vacation, etc. Again, this would have unfairly required other employees to work these shifts in his stead and required defendants to bear more than a *de minimis* burden by paying these employees compensating time off or by operating understaffed. Although plaintiff did agree to work more Sunday, holiday, and night shifts to make up for his inability to work on Saturdays, this option was infeasible because it would have required him to work a predictable schedule, thus impeding CDFA's legitimate interest in avoiding the possibility of collusion.

Moreover, scheduling plaintiff to be off Saturdays would have severely hampered defendants' ability to accommodate other employees' legitimate secular and religious needs, even on a temporary basis, further unfavorably impacting other employees and creating a situation where plaintiff essentially would have been accorded preferential treatment over his co-workers. *Cf. Yott*, 602 F.2d at 908 ("transferring and training Yott appears to constitute a preferential treatment over other . . . employees of a substantial nature, contrary to [*Hardison*]"). Finally, there was testimony indicating that accommodating plaintiff would have led to substantial

morale problems and several additional requests for permanent accommodations, creating an even more significant impact on other employees and on the station's operation.

In sum, plaintiff could not have been reasonably accommodated through scheduling because such an accommodation would have had a prohibited discriminatory impact on other employees, and/or required defendants to incur more than a *de minimis* cost (either by paying another employee compensating time off or by operating the station understaffed).

Shift trades also were an unreasonable accommodation, for several reasons. First, defendants had the authority to order shift trades only where it would benefit CDFA. Mandatory shift trades would not have benefitted CDFA in this instance, because it would have impaired its legitimate interest in minimizing predictable scheduling patterns. Moreover, even if defendants did have the authority to order shift trades, this would have had a prohibited discriminatory impact on other employees.

With respect to voluntary shift trades, the informal poll taken by defendants indicated that none of the employees were willing to accommodate plaintiff on a permanent basis, although a few were willing to trade shifts with plaintiff occasionally. In light of this unwillingness, it would have been only a matter of time before plaintiff would have been unable to find a replacement to work his designated shift. Indeed, such a situation had occurred in the past when other employees had attempted to trade shifts even on a temporary basis. In these circumstances, employees were expected to work as

scheduled. Plaintiff, however, would not have been able to work on a Saturday under *any* circumstances and defendants would have been required to order another employee to cover for him, or operate short-handed, both of which would have had a discriminatory impact on other employees and involved preferential treatment of plaintiff and greater than *de minimis* costs. Finally, even if an employee had been willing to trade with plaintiff on a permanent basis, again, this would have violated CDFA's policy of avoiding consistent scheduling patterns.

Plaintiff also could not have been transferred to another position within CDFA, such as grain and commodity inspector, that did not require Saturday work because plaintiff had to qualify for the position through a competitive examination process. Furthermore, Howard Ingham testified that there was no opening for a grain and commodity inspector at the time plaintiff was hired. Transferring plaintiff to another border inspection station also would not have obviated the problems inherent in accommodating plaintiff's religious beliefs, because all of the other stations had the same number or even fewer employees than did the Yermo station, and were subject to the same constraints on scheduling and shift trades.

Plaintiff argues that the fact that defendants accommodated other employees for both religious and secular reasons demonstrates that a reasonable accommodation was possible. The court disagrees. The evidence was that defendants had never previously accommodated an employee on a permanent basis for a twenty-four hour period on a particular day every week. Rather, all prior accommodations had been simply temporary, and had

affected a limited number of shifts. The potential reasonable alternatives for accommodation are much greater when only a temporary accommodation is required. In addition, unlike plaintiff's need for accommodation, previous temporary accommodation requests had not been rigid and inflexible: an employee could, if necessary, work on a day which he preferred to have off. (Even Renee Finney, a seasonal SDA employee who was given her Sabbaths off for a period of three months during the summer, worked on a Saturday during an emergency.) Therefore, the evidence regarding temporary accommodations is not relevant to the instant case. Accordingly, the court rejects plaintiff's argument that this evidence demonstrates that a reasonable, permanent accommodation was available.[17]

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[17] Plaintiff also asserts that Exhibit 19 demonstrates that a permanent accommodation was feasible. This document provides in pertinent part:

> [W]e are prepared to offer you employment as a [PQI] at our Yermo Agricultural Inspection Station. Like all [PQI's], you will be scheduled to work varying shifts, including Saturdays, Sundays and holidays. If you are unable to work as scheduled, you will be required to contact your co-workers to arrange re-scheduling coverage for those days which you will be unable to work. If none of your co-workers are willing to voluntarily provide the coverage necessary our Department will take the necessary steps to direct an employee to work those hours and pay them the appropriate overtime compensation. Those hours of your schedule which you are unable to work will be docked from your pay.

As an offer of settlement, Exhibit 19 normally would be inadmissible under Federal Rule of Evidence 408. However,

Alternatively, plaintiff contends (without citation to authority) that because at least a temporary accommodation was feasible, defendants were legally required to accommodate him while they searched for a permanent accommodation, even if that accommodation option ultimately proved unavailing. The law is to the contrary. Defendants are not required to perform a futile act. *See Townley*, 859 F.2d at 615 ("[i]f an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act"); *see also Yott*, 602 F.2d at 908 ("it could be inferred that the accommodation was of such temporary duration as to make the accommodation ineffectual and thus unreasonable"). Here, even assuming that a temporary accommodation of some kind was feasible, as discussed above, defendants have established that a permanent accommodation was not possible and therefore not reasonable.

Finally, the court rejects plaintiff's contention that defendants' evidence of undue hardship is purely speculative. In two companion Ninth Circuit cases, *Anderson* and *Burns*, the court established guidelines governing the

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defendants did not object to the admissibility of this document at trial and it was accordingly admitted for all purposes. Nevertheless, despite its admission into evidence, the court rejects plaintiff's suggestion that Exhibit 19 should be given substantial weight. In fact, this document is entitled to no weight because it is not relevant to establish that defendants could have reasonably accommodated plaintiff without suffering an undue hardship. Defendants do not state or imply in the letter that they are able to accommodate plaintiff's religious beliefs and in fact, place the burden on plaintiff to accommodate himself.

sufficiency of an employer's proof of undue hardship. In *Anderson*, 589 F.2d 397, the plaintiff, a member of the SDA Church, was employed by General Dynamics Convair Aerospace Division. After plaintiff was hired, the local union and the employer entered into a collective bargaining agreement which required all employees to join the union by a specified date. Because plaintiff's religion prohibited him from belonging or contributing to labor organizations, he refused to pay his union dues. Four days later, plaintiff was discharged and he consequently filed suit. At trial, the parties stipulated that neither the union nor the employer had offered plaintiff any specific accommodations. They also stipulated that plaintiff had agreed to pay the equivalent of union dues to a recognized charity. The district court entered judgment in favor of defendants (the union and the employer), and plaintiff appealed.

On appeal, defendants argued that accommodating plaintiff would have imposed an undue hardship on them because it would have created a "free rider" problem. *Id.* at 401. The Court of Appeals rejected this argument, stating:

> neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply on general sentiment against free riders.
>
> Undue hardship means something greater than hardship. Undue hardship cannot be

> proved by assumptions, nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship.

Id. at 402.

Again in *Burns*, 589 F.2d 403, a case involving nearly identical facts, the court rejected the union's argument that it could not have reasonably accommodated the plaintiff because such an accommodation would have lead to "free rider" problems that would have caused "serious dissension among employees, resulting in inefficiency of operation." *Id.* at 406. The court admonished:

> [w]e are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted. As we noted in *Anderson*, . . . undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. An employer or union would have to show, as in *Hardison, actual imposition* on co-workers or disruption of the work routine.

Id. at 406-07 (emphasis added); accord *Townley*, 859 F.2d at 615, quoting *Tooley*, 648 F.2d at 1243 ("[a] claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on coworkers or

disruption of the work routine' "). The *Burns* court likewise rejected, as mere speculation unsupported by the record, the union's contention that "accommodating Burns would open the gate to excusing vast numbers of persons who claimed to share Burns' beliefs, thence resulting in a greater than *de minimis* burden on the Union [and its] members."[18] *Id.* at 407.

Contrary to plaintiff's assertion, defendants' proof of undue hardship satisfies the requirements of *Anderson* and *Burns*. It is significant that defendants in *Anderson* and *Burns* did not make any attempt to accommodate the plaintiffs. Nor had they offered *any* concrete evidence of undue hardship. Rather, they simply *argued* that, based on a general and unspecified sentiment against free riders and a vague notion of additional requests for accommodation, an undue hardship would result. Moreover, defendants' witnesses did not attempt to relate the alleged sentiment against free riders to the plaintiffs or even to hypothetical persons who might receive similar accommodations. These factually unsupported arguments were their primary defenses on appeal.

Here, in contrast, defendants not only made an initial attempt to accommodate plaintiff, but more importantly,

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[18] The court notes, but does not attempt to resolve, the apparent conflict between this statement and footnote 15 in *Hardison*, in which the U.S. Supreme Court rejected the dissent's suggestion that paying overtime to one employee could not involve more than a *de minimis* cost, on grounds that it failed "to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working [weekends]." 432 U.S. at 84 n.15.

they offered specific evidence that, for a number of reasons, they would have sustained an undue hardship had they been required to accommodate plaintiff's religious beliefs on a permanent basis. This evidence is much more than proof of "some fellow-worker's grumbling or unhappiness." *See Burns*, 589 F. 2d at 407. On the contrary, as discussed *supra*, defendants' evidence shows that accommodating plaintiff would have imposed actual hardships on other employees and would have actually disrupted the work routine by requiring employees to work more Saturdays and Friday night graveyard shifts and to cover for plaintiff in emergencies and other situations, and by restricting defendants' ability to accommodate their legitimate needs. It also shows that defendants would have incurred more than a *de minimis* cost, either in monetary terms or in terms of lost efficiency, by accommodating plaintiff.

Moreover, defendants' argument that accommodating plaintiff would have lead to substantial morale problems and additional requests for accommodation is not hypothetical, for two reasons. Unlike in *Anderson* and *Burns*, this argument is supported by the testimony of several of defendants' witnesses. Defendants also offered evidence that, on one occasion when a lay minister at another border inspection station was given Sunday mornings off to perform a church service, several Catholic employees filed grievances and asked to have Sunday mornings off so that they, too, could observe their Sabbath. It is reasonable to infer that, based on the similarities in operation and staffing of border inspection stations, a similar situation would have occurred at the Yermo station if plaintiff had been accommodated.

Finally, a number of other circumstances, particularly the unfairness inherent in accommodating plaintiff, the employees' desire to have Friday nights and Saturdays off, and the size of the workforce at the Yermo station, indicate that it would have been only a matter of time before morale problems, additional requests for accommodation and the associated undue hardships on defendants and other employees would have occurred.[19] *See Yott*, 602 F.2d at 909 ("[i]t is not unreasonable to infer in light of the facts of this case that exempting Yott [from paying union dues] could lead to further exemptions for religious or other reasons").

Plaintiff's argument that defendants must actually attempt to implement *all* suggested methods of accommodation before they may sustain their burden of showing undue hardship misreads the Ninth Circuit's holdings in *Anderson* and *Burns* and confuses proof of speculative or hypothetical hardship with proof of future or anticipated hardship. The former is insufficient under *Anderson* and *Burns*, but the latter is not. The case law does not require an employer to have actually endured a hardship in order to meet its burden of proof. Rather, "[o]nce the employer has made more than a negligible effort to accommodate the employee and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute

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[19] This is in contrast to the situations in *Anderson* and *Burns* where it was not clear that the proposed substituted charity accommodation would have necessarily lead to "free rider" problems. This accommodation was not inherently unfair because the plaintiffs would have paid the same amount of money to a charity as the other employees paid to the union.

'undue hardship'." *Burns*, 589 F.2d at 406 (emphasis added). The *Burns* court did note that it was "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice." *Id.* However, this statement means only that the employer is in a better position before the court if it has unsuccessfully attempted an accommodation, because it may more easily sustain its burden of proof. *See id.* ("[t]he employer is on *stronger* ground when he has attempted various methods of accommodation") (emphasis added). This language cannot reasonably be read to mean that an employer may *never* sustain its burden absent an attempt to implement a particular accommodation. In fact, such a reading of the law is belied by subsequent Ninth Circuit opinions, which plainly indicate otherwise. *See Townley*, 859 F.2d at 615 ("[w]hen an employer does *not* propose an accommodation, . . . [he] must accept the employee's proposal *or* demonstrate that the proposal *would* cause the employer undue hardship") (emphasis added); *accord Hacienda Hotel*, 881 F.2d at 1512.

In sum, for all the foregoing reasons, the court concludes that defendants have satisfied their burden of proving by a preponderance of the evidence that accommodation of plaintiff's religious beliefs would have caused them to sustain an undue hardship.

D. Defendant's Other Defenses/Plaintiff's Damages.

In light of the above conclusion, the court need not address defendants' other defenses, nor need it address the issue of the amount of plaintiff's damages.

IV. Conclusion.

By reason of the applicable law set forth above, as applied to the facts found by the court and also set forth above, the court concludes as follows:

1. The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(4).

2. Plaintiff has proven by a preponderance of the evidence a prima facie case of religious discrimination, pursuant to 42 U.S.C. § 2000e-2(a)(1).

3. Defendants have proven by a preponderance of the evidence that they could not have reasonably accommodated plaintiff's religious beliefs without suffering undue hardship, pursuant to 42 U.S.C. § 2000e(j).

4. In light of the foregoing, judgment shall be entered in favor of defendants denying plaintiff's claims for relief and awarding costs to defendants.

IT IS SO ORDERED.

DATED: July 25, 1994.

/s/ Milton L. Schwartz
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KWASI OPUKU-BOATENG Plaintiff-Appellant, v. STATE OF CALIFORNIA; CLARE BERRYHILL; MIMI KHAN; GLORIA HARMON Defendants-Appellees.	No. 94-16542 D.C. No. CIV S-87-755 MLS ORDER (Filed Nov. 15, 1996)

Before: REINHARDT and BOOCHEVER, Circuit Judges, and KING, District Judge.*

The panel has voted to deny the petition for rehearing. Judge Reinhardt has voted to reject the suggestion for rehearing en banc and Judges Boochever and King so recommend. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

REPORTER'S TRANSCRIPT ON APPEAL
VOLUME IV OF VI pp. 951-953

HOWARD INGHAM

Direct Examination by Mr. Getz 951-953

* * *

[p. 951] Q (By Mr. Getz): All right; let me refer to that. You're referring to a time that resulted in a grievance. Can you very briefly explain what that incident was all about first, then I'll ask you about the time frame.

A This involved the station at Truckee. At that time it could have been in the early Seventies, but Truckee was a very small town. It had one Catholic church and it had one community Protestant church.

The Protestant church did not have at times a permanent minister, and one of our inspectors was a lay preacher that would fill in in the absence of the – of an assigned preacher. And we learned at the time of the grievance that the station supervisor had been accommodating this lay preacher where he could have Sunday mornings off to preach, but the man did work later – a later Sunday shift that same day or he had worked the graveyard prior to it, but he had off the shift covering the time of worship.

[p. 952] We had five or six Catholic members who saw this accommodation and got together among themselves and said "well, you know, we're supposed to go to church on Sunday too, they're allowing this Protestant, let's get the same treatment." So they asked the station manager that they – all five of them wanted off Sunday morning along with the Protestant, which made half the crew off at the same hour, same day, four times a month,

and it was just impossible to have a work shift coverage with that situation.

And when the station manager said no, these five or six employees filed a formal grievance which ended up on the assistant director's table with the grievance procedure. It was his in his ballpark.

Q Now this was done with CDFA?

A Yes, yes.

Q Now what was your involvement with that process?

A At the time I was the program supervisor.

Q Okay. So you became aware of this in that capacity?

A Yes.

Q Had you approved this arrangement?

A No, nor would I if I had knowingly known it.

Q Okay. Now why?

[p. 953] A I was aware where the man had occasionally asked fellow employees to trade, but it degenerated, if I may use that word, into a situation where it no longer became an option to the other employees. The station supervisor was scheduling this man off.

Q Now let me just stop you there. In 1982, which is after this incident you referred to –

A Um-hmm.

Q – did you have any problem or policy against allowing employees for religious reasons specifically to let somebody go to church?

A No, not if they could trade with a fellow employee who was willing to trade. Only that the station supervisor would not schedule, and I'll call it an accommodation, or give him a privilege that others didn't have.

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REPORTER'S TRANSCRIPT ON APPEAL
VOLUME V OF VI pp. 1061-1062

HOWARD INGHAM

Cross-examination by Mr. Boothby 1061-1062

* * *

[p. 1061] Q (By Mr. Boothby): All right. Now the problem in Truckee is a different problem than we have with Mr. Boateng; isn't that true?

A I don't see it as a different one.

Q Well, the problem in Truckee, as I understand your testimony, is that Mr. Risden wanted to be off on Sunday morning so that he could go and take care of his lay ministerial responsibilities at church on Sunday morning, and at some point in time there were some Catholic ladies that said "look, I want to go to church on Sunday morning," and all of a sudden it became a hardship when six people wanted to be off at the same time for religious reasons; isn't that what happened there?

A That's exactly it, only it was men, not ladies.

Q All right. Whatever. But the problem was that there was a hardship because a lot of people wanted [p. 1062] off at the same time. It was all for the same reasons, for religious reasons; that's what happened in Truckee?

A The reasons had no bearing. It was just six people wanting time off for any reason at the same time.

Q Whatever, but that's what caused the hardship, right?

A Yes.

Q All right.

A Made an inability to cover Sunday morning shifts at Truckee.

Q Did you have any other individual at the Yermo station that you were aware of that was seeking to be off on a regular basis from sundown Friday to sundown Saturday?

A No, not that I was aware of.

Q So what you're really saying is that based upon what happened in Truckee you were speculating that sometime in the future there might be other people that would want to be off at the same time, creating a problem; is that basically what you're saying?

A I'm not an expert in the field of statistics, but the theory of probability tells me yes – or I think a more recent statement would be Murphy's law; if it can happen, it will.

* * *

Supreme Court, U.S.
FILED
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No. 96-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF CALIFORNIA,

Petitioner,

v.

KWASI OPUKU-BOATENG,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth of Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the religious accommodation provisions of Title VII, 42 U.S.C. § 2000e(j), a state employer must, at a minimum, provide a prospective employee with equal opportunity to utilize scheduling, shift trade, and transfer opportunities for religious accommodation as are generally available to its employees.

2. Whether an employer claiming undue hardship is required to prove accommodation is not possible by demonstrating both the magnitude and the fact of the hardship.

3. Whether the petitioner can now for the first time raise the Establishment Clause and Tenth Amendment issues when it failed to raise or preserve either before the district court or the court of appeals.

4. Whether, if it is permissible for the petitioner to raise the constitutional issues before this Court, the Ninth Circuit's decision affording respondent the same equal opportunity to utilize scheduling, shift trade, and transfer opportunities for religious accommodation as are generally available to other employees violates either the Establishment Clause or the Tenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner, who was a defendant below, is the State of California. Other individual State officials who were originally named as defendants were dismissed as parties in the district court.

Respondent, who was the plaintiff below, is Kwasi Opuku-Boateng, an individual.

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STATEMENT OF THE CASE

Introduction

In its Petition for Writ of Certiorari, the State of California presents facts in a distorted and incomplete manner. In some instances, it takes great license in summarizing testimony while omitting facts unfavorable to its interests.

Respondent generally adopts the factual statements included in the court of appeals opinion under the heading "Background." App. at 3-9.[1] To a large extent, the Ninth Circuit's recitation of the facts reiterates the trial court's findings of fact, App. at 34-39, with one notable exception -- the claimed outcome of a poll, App. at 38. The court of appeals determined that poll to be fatally flawed, App. at 20, and found, to the extent the district court relied on the results of the poll, it was reversible error. App. at 22. Nevertheless, petitioner's statement of facts continues to improperly include the claimed results of the poll as one of its linchpin factual claims. Pet. at 8.

Because respondent did not attempt to use involuntary trades as a method of accommodation, petitioner's factual representations concerning the claimed work schedule preferences are irrelevant. What is relevant is how use of the scheduling process already in place, coupled with voluntary trades at this entry level employment position, together with normal subsequent transfers, if permitted by petitioner, could

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[1]References appearing herein are as follows: "App. at __" refers to the Appendix to the Petition; "App __ *infra* at __a" refers to the Appendix to this Brief; "RT __" refers to the Reporter's Transcript on Appeal; "Pl. Ex. __" refers to plaintiff's trial exhibit; "Pet. at __" refers to the Petition for Writ of Certiorari.

have resulted in a reasonable accommodation.

Statement of Facts

On October 18, 1982, Opuku-Boateng was awarded the position of plant quarantine inspector at the Border Inspection Station in Yermo, California, to begin working November 2. That station employed a total of 15 permanent inspectors,[2] including 5 supervisors. It operated 7 days a week, 24 hours a day, and maintained 3 eight-hour shifts: day, evening, and night. The size of the staff and number of shifts increased during certain times of the year, such as summer. App. at 4.

As the trial court found, employees were required to work "an equal number of undesirable weekend, holiday, and night shifts." Policy required employees be assigned varying schedules to avoid the possibility of collusion between inspectors and truckers and to expose inspectors to the myriad commodities being transported. App. at 5.[3]

Upon being selected for the permanent position, Opuku-Boateng terminated his temporary employment at another location with the Department and moved his family to Yermo.

---

[2]Often temporary inspectors were used to supplement the work force when needed. App. A *infra* at 15a-16a; RT 500.

[3]Although petitioner refers to the scheduling arrangement as a "rotating shift," Pet. at 2, it was not the normal "rotating" shift within which an employee would be scheduled according to sequential rotation. The shift assignment depended on the discretion of the scheduler. *See* App. A *infra* at 16a-19a. In fact, the schedule was established so it would be non-predictive to avoid collusion. RT 864-65. The actual work schedules at smaller inspection stations, such as Meyers and Topaz, did not follow a rotational schedule. Pl. Ex. 25. Plant inspectors were allowed to voluntarily trade or swap shifts among themselves. RT 400-01, 937.

On October 28 he visited the station where he reviewed the work schedule learning he was scheduled to work Saturday, November 14. He informed the acting supervisor, William Whitacre, that his religious beliefs precluded him from working on his Sabbath. App. at 5. Whitacre became angry, telephoned his supervisor Charles Gray, saying "there is a guy here who says he cannot work Friday, he cannot work Saturday, he cannot work Sunday, and we don't need him here." RT 111-12.

Whitacre advised Opuku-Boateng unless he agreed to work Saturday his appointment would not be processed. Respondent telephoned Gray to inform him of the problem. App. at 5. Contrary to Whitacre's assertion, respondent advised Gray he was not requesting all three days off. He also said he was willing to take night positions and work every Sunday or do anything else to work out an accommodation. RT 124. Respondent also noted that since there were three shifts on Friday, he could work at least one, and possibly two, as well as one of Saturday's shifts. RT 214-16.

Gray told Opuku-Boateng another employee wanted Sundays off, and respondent indicated he would work Sundays if that employee would work Saturdays. RT 221-23. Gray said to agree to that would be demoralizing to others. RT 113-15. Gray advised respondent the Department could not accommodate him but then said he could not make that decision without speaking with his superiors. RT 115-16.

Gray spoke with the program supervisor, Howard Ingham, about Opuku-Boateng. RT 907. Ingham testified he instructed Gray not to complete respondent's appointment but said he was "going to clear [it] through Personnel to make sure [he was] on solid ground." RT 975. Ingham then contacted personnel indicating he did not feel the Department should

continue with respondent's appointment. RT 976.

On November 1, Ingham wrote Opuku-Boateng saying his request for accommodation had been reviewed and if he wanted to work as a plant inspector, he would be expected to work assigned shifts as scheduled. App. at 7-8. On November 3 respondent's attorney filed a complaint on his behalf with the State Personnel Board claiming violations of state and federal law. App. at 8. On November 8 Ingham informed respondent the appointment would not be made since he could not be "available to work frequently from Friday sundown through Saturday." *Id.*

DISPUTED STATEMENT OF FACTS

Factual exaggerations and inaccuracies pervade petitioner's statement of facts:

(1) Petitioner states that "[w]hile one or two employees were willing to make occasional trades, none were [sic] willing to trade with the respondent on a regular or permanent basis." Pet. at 8; *also see* p. 12. In overstating the facts, petitioner refers to RT 444-47, but fails to accurately state that testimony. Maria Lozano, one of the supervising employees, testified: "I would be willing to trade with him sometimes but not all the time." RT 444. However, she also testified she assumed other employees would be willing to swap with respondent. *Id.* at 445. Lozano was concerned about any *permanent requirement* imposed by the Department that she swap, particularly when she had been told that respondent was requesting three entire days off each week. *Id.*[4]

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[4]Petitioner failed to include the testimony of Delbert Lee, an inspector at Yermo and one of the State's witnesses. At the trial the State never even asked Lee whether he would have been willing to trade. However,

(2) Petitioner contends the evidence showed most employees preferred not to work *Saturdays* because they wanted to be with their families. Petitioner fails to reveal the testimony was for *both Saturday and Sunday*. Lozano testified Sunday was equal to or an even more undesirable work day. Lozano testified some, but not all, preferred to be off weekends. *Id.* at 442. "But not everyone that works at the Yermo station... have the same priorities" concerning days off, she said. *Id.* at 476. She acknowledged that while attending school, she did not prefer to have Saturdays off. *Id.* Petitioner also cited William Whitacre. But he testified a successful Saturday swap depends upon the employee with whom you request a trade. *Id.* at 501. The only other testimony cited by petitioner was that of Ingham who testified only that "employees want[ed] as many weekends off as possible." *Id.* at 1012.

(3) Petitioner stated that "getting another inspector to give up a weekday shift for a Saturday was very *unlikely*." Pet. at 11 (emphasis supplied). The only support for this statement was from Fred Sandridge who testified it was *easier* to trade a weekday than a weekend. *Id.* at 633. Sandridge testified employees "like their day shifts on Saturday, and very seldom -- again, would trade into evening shifts and 4:00 to midnight and graveyards only if they were going to school." *Id.* at 640. Sandridge testified Sunday was an even heavier workday than Saturday, the heaviest they had. *Id.* at 634. Lozano agreed that a person who does not want to work on Saturday would have less success swapping with an employee who has to work on a Tuesday because it would break up his/her days off. *Id.*

Lee testified he and other employees engaged in shift swapping to obtain time off for "personal pleasure." RT 887. He said there never was a time when he was unable to get off from work. *Id.* He testified he knew of no preference among employees at Yermo concerning days to be swapped and he had no preference.

at 438-39. Elisa Martinez testified it depended upon the employee with whom one attempted to swap whether it would be more difficult to be off on a Saturday. RT 501.

(4) Petitioner acknowledged that a likely trade was a Saturday shift for a Sunday one. But contended the pool of people with whom one might make such a Saturday-Sunday trade was generally limited to only two other inspectors. Pet. at 11. The testimony, however, shows the pool would also include additional inspectors who were off duty, thus increasing the available pool. *Id.* at 637. In addition, there were six- and nine-month seasonal employees as well as "time worked" employees who were available for assignments when needed. App. A *infra* at 15a-16a; RT 500, 509.

Gray told Opuku-Boateng there was an inspector who wanted to be off on Sunday for religious reasons. RT 221-23. But apparently no consideration was given to such reciprocal trades for religious reasons. Martina Haleamau, branch chief at the Department who testified for the State, had the overall responsibility for five major programs, including quarantine enforcement. She testified that such trades would make accommodations easier. *Id.* at 1175.

(5) Petitioner flatly states that "[e]mployees also keep track of the shifts they work, and would complain if they perceived an unfair allocation of weekend and weekday shifts." Pet. at 8. But the testimony shows that if some employees did this, others did not. RT at 501, 578, 886.

Petitioner's statement is also misleading. Although petitioner cites the testimony of Ingham to support its position about scheduling complaints, when Ingham was asked to provide an idea of some of the complaints he had received about scheduling, he focused not on Saturday or weekend scheduling

concerns, but rather on graveyard and holiday shifts. He testified:

> Primarily it was the assignment of too many graveyards, too many -- "I'm getting assigned more graveyards" or "I'm being assigned more swings" or "I'm not getting holidays that the others are getting," and it was why we were almost paranoid to the point of trying to be equal to all employees.

RT 958. Although petitioner cites Fred Sandridge, he, like Ingham, confirms the complaints did not relate to weekend scheduling, but rather graveyard shifts. *Id.* at 608. It is clear from the record that the Yermo employees' greater concern was assignment to graveyard shifts and holidays. Of course, Opuku-Boateng's offer to work the graveyard and night shifts and holidays would have provided the Department with an opportunity to reduce such complaints while accommodating respondent's religious needs.

(6) Petitioner contends there were four criteria used in scheduling, Pet. at 8-9. The State attempts to conjoin a mishmash of testimony taking snippets of testimony and discarding others not in its interest. It then announces a four-part "criteria" which no witness ever said were the four main criteria used by schedule-makers.[5] Sandridge testified about making out a monthly schedule:

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[5]This argument seems to stem from petitioner's trial strategy where the State attempted to introduce evidence about the impact of accommodation claiming to use the actual 1982 Yermo schedules. However, trial examination showed this to be a sham, and the schedule had been fictionalized to produce what the State finally admitted to the court was its "goals" rather than actual practice. App. E *infra* at 51a-57a and App. F *infra* at 62a-67a.

> The practice every month in making out the schedule was to be sure that the days off are posted first and everybody got the special days that they requested such as birthdays, anniversaries, and any other type of special, one-period-of-time request, and then next was to fill in the various shifts that were worked.

Id. at 600. *See also* Maria Lozano's testimony confirming that the scheduling process permitted all employees to request shifts off prior to the posting of the schedule. App. A *infra* at 4a-5a, 10a, 19a-20a.

Sandridge was asked by the court whether in scheduling "each person would work the same number of shift number 1 on the same day, so that, if possible, every person would work the same number of shift number 1 on Thursday as everybody else and shift number 2 on any other day -- or any day, Saturday, the same as everybody else so that everybody ends up working during the month the same number of each shift and the same number of each shift per day?" Sandridge responded:

> Not quite that extent. What it was, was for a 12-month period you would try to equalize the number of shifts worked over a 12-month period, but the days didn't intervene in it at all. We didn't try to consider whether it was a Saturday or Sunday, we just considered the total number of each shift.

Id. at 603-04. Sandridge also stated the Department only attempted to equalize the number of shifts posted by the schedule-maker. He stated that "because of the number of changes as happen immediately when you post [the schedule] . . . you only count the assigned shifts. You do not count the shifts that they trade into." *Id.* at 609.

Martina Haleamau, cited by petitioner about the scheduling criteria, Pet. at 8, testified only that it was necessary

> to make sure that [the schedule] is equalized and they're meeting the criteria, 40 hours a week, that employees are adequately -- the days, swings, and graveyard shifts are covered and that no one employee is given favoritism with regard to all days or all swings or all graveyards, and to make sure that the employees all had equal time off, *whether it was during the workweek or on the weekends*.

Id. at 1105-06 (emphasis supplied). Haleamau also testified that "[o]ne of the criteria is to try to give them a *weekend off a month*. We try also to give them *more than two days* off if we can because it helps them." *Id.* at 1139-40 (emphasis supplied). The record proves the Department did not follow any pattern for the scheduling of employees, and its claim to a four-part criteria is pure fiction. *See* App. A *infra* at 5a-6a, 17a-21a; App. B *infra* at 22a-26a; App. D *infra* at 45a-50a; App. F *infra* at 62a-67a. In fact, Ingham admitted the so-called rotation requirements were not official Department policy, but rather his concept of "fairness" and an attempt to "eliminate complaints." App. D at 36a.

(7) Petitioner states "[s]cheduling an inspector, like respondent, to have a fixed twenty-four hour period off every week at such a small station would be virtually impossible." Pet. at 10-11. Nothing cited by the petitioner, however, supports the statement that it would be "virtually impossible" to provide an accommodation at a smaller station, even on a temporary basis.

William Whitacre testified there is *less flexibility* for providing an accommodation at a smaller station. But

Sandridge's, RT 641-42, and Haleamau's, RT 1017-18, testimonies have nothing to do with the ability to accommodate at small stations. In fact, Renee Finney, an Adventist like respondent, was accommodated for three months in the summer of 1980 at Topaz, a small station, and in 1982 at Meyers, another small station, without once being scheduled or required to work during her Sabbath. RT 695-96, 702-04. In order to accomplish this, Finney worked more Sundays than other employees. *Id.* at 705. This arrangement was logical since there was another employee who wanted to attend church on Sunday. *Id.* All this was accomplished through scheduling, and Finney was never even required to trade with another employee. *Id.*[6]

(8) Petitioner states that "inspectors often could not find others with whom to trade, even when they had compelling reasons for the swap like a family emergency." Pet. at 12. For example, petitioner cites Delbert Lee. However, Lee testified there were never occasions when he was unable to swap. *Id.* at 887. Lozano recalled only one event in 1979 when she was unable to swap. *Id.* at 434-35. Martinez testified there were instances when she tried to swap shifts but was unsuccessful. *Id.* at 499. However, she testified that from time-to-time she had requested accommodation to attend church board meetings, stating: "If I knew ahead of time I would ask to work certain shifts. If I didn't know and it was an emergency meeting, if I could trade, I did; if I couldn't, I couldn't go to the meeting." *Id.* at 493. But, of course, her inability to trade may just have been due to the shortness of the notice.

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[6]Ingham admitted that because Finney was temporary, and not permanent, was irrelevant since scheduling requirements for both classes of employees are the same. App. D at 34a-35a.

(9) Petitioner states that efforts were made to temporarily accommodate needs of inspectors for time off for things like college courses or church meetings but were only for temporary periods. Pet. at 12. Although college courses lasted only for a semester, some inspectors continued semester after semester. For example, Deedee Day pursued a degree at Cal State in San Bernardino.[7] App. A at 5a, 7a-8a. And for 10 years a lay minister was accommodated to attend Sunday church in Truckee. *See* App. H *infra* at 69a.[8] Also, Adventist Renee Finney was accommodated for three successive summers: 1980, 1981, and 1982, for a total of 10 months with only one occasion where she agreed to work her Sabbath during the med-fly crisis. RT 694-708.[9]

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[7]Lozano testified she made special arrangements for employees who wanted to be off for school and other reasons. RT 350-51; App. A *infra* at 4a-5a, 7a-9a. She testified there were three criteria she considered when scheduling an employee's needs: (1) she checked to see if she could provide the requested time off; (2) if that did not work, she attempted to give the employee a shift that would provide a sufficient window necessary to meet the employee's needs; and (3) if that failed, she attempted to provide the employee with a shift that enhanced his or her ability to trade. Such arrangements have been used on a long term basis to permit employees to attend college. RT 377-78, 380-82. *See also* App. A *infra* at 5a.

[8]Ingham acknowledged the ten year accommodation of the lay minister in Truckee had been accomplished through voluntary trades, but he was opposed to allowing respondent to be accommodated that way. Ingham speculated a problem might arise at Yermo even though no one else had requested off sundown Friday to sundown Saturday. App. D *infra* at 36a-44a. Ingham testified his refusal to accommodate respondent came from administration who said "thou shalt not . . . accommodate . . . for any reason." *Id.* at 38a.

[9]Ingham admitted if he had known, he would have refused the seasonal employment and religious accommodation of Finney. App. D *infra* at 34a-35a.

REASONS THE PETITION SHOULD BE DENIED

INTRODUCTION

This is a straightforward Title VII case. It was decided on the application of Title VII's religious accommodation provisions, as interpreted by this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Although the trial court found in favor of the petitioner, the court of appeals concluded the trial court's findings of undue hardship were clearly erroneous. Respondent further contends when an employer claims it is unable to offer any reasonable accommodation without undue hardship, it must thereafter prove by competent evidence such an accommodation is not possible. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1489 (10th Cir. 1989). And in so doing, it must demonstrate both the magnitude of, as well as the fact of, the hardship. *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 134 (3d Cir. 1986); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). This the trial court failed to do.

Respondent sought accommodation through existing procedures used at Yermo by other employees with regard to scheduling, voluntary trades, and subsequent transfers. The evidence proved the State's policy requiring unpredictability in alteration of work shifts at border stations would not be compromised by such an accommodation. After a full review of the record, the court of appeals agreed.[10]

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[10]There is ample evidence provided by Yermo supervisors that respondent could have been scheduled off during his Sabbath without violating any of the State's legitimate concerns. RT 583; RT 1096. In fact, all employees within each border station did not rotate every month. App. D *infra* at 45a, 47a-49a; RT 1088-89.

As noted by the Ninth Circuit, the State conceded it had an obligation to investigate whether voluntary shift trading was feasible. The court of appeals concluded the district court, relying on the results of a flawed poll of the Yermo employees, had erroneously concluded voluntary shift trades were not feasible.[11] The court of appeals decided the district court erred in relying on those results and further determined the State had failed to offer any probative evidence that would demonstrate a system of voluntary shift trades was infeasible. App. A at 20a-21a.[12]

The Ninth Circuit also concluded the poll results evidence was inadmissible as hearsay and further was not reliable. In fact, the district court itself, though subsequently relying on the results of the poll, properly determined it could not consider testimony about the poll results. App. A *infra* at 21a. Notwithstanding this determination, the trial court then relied expressly on the poll's results when determining whether voluntary shift trades were feasible. App. A at 63a. Thus, in order to prevail, petitioner must convince this Court to overturn the appellate court's evidentiary holding. A review

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[11]Instead of conducting a poll, under the EEOC "Guidelines on Religious Discrimination," 29 C.F.R. § 1605.2(d)(1)(i) (1980), the employer has the duty "to facilitate the securing of voluntary substitutes." The trial court considered such an obligation purely esoteric. RT 463-64.

[12]The trial court's conclusion an accommodation through voluntary trades inferentially would have resulted in an undue hardship was premised upon the its assumption or speculation that at some time in the future respondent would have been unable to secure a voluntary trade. But "[f]indings cannot be based on speculation and conjecture." *Soloman v. Northwestern State Bank*, 327 F.2d 720, 273 (8th Cir. 1984); *see also Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

of the full record discloses there was no misapplication of the clearly erroneous standard in the court of appeals' reversal of the trial court's finding of undue hardship.

This case is no different from the dozens of other fact-sensitive religious accommodation cases decided in the lower courts since *Hardison*. It has little application beyond the peculiar fact situation present in this case. As will be shown, the court of appeals' decision does not violate the teachings of *Hardison* and is in accord with other lower court decisions; nor does it violate the Establishment Clause or the Tenth Amendment to the United States Constitution.

I. THE COURT OF APPEALS PROPERLY APPLIED BOTH THE CLEARLY ERRONEOUS STANDARD AND APPLICABLE LAW.

This Court in *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985), recognized that the meaning of the phrase "clearly erroneous" is not immediately apparent. Citing *United States v. United States Gypsum*, 333 U.S. 364 (1948), the Court found that in applying that test one of the foremost principles is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* That is exactly what the court of appeals did here in concluding the trial court's holding on the "undue hardship" issue was clearly erroneous. App. at 16, 18-21, 24, 27, 29-30.

In struggling to demonstrate that the court of appeals exceeded its role, petitioner incorrectly contends the Ninth Circuit reweighed the evidence in a *de novo* fashion providing as "the most glaring example of this reweighing" the facts relating to the accommodation of a lay minister in Truckee.

Petitioner states: "The district court found that the Truckee episode was evidence that accommodation was likely to cause morale problems and further disruptive requests for accommodation." Pet. at 26. Petitioner argues that the court of appeals had no right to read the evidence as indicating that religious accommodation would be successful. *Id.*

The court of appeals did not determine the State's witness' testimony was not credible either as to the accommodation having been made for 10 years or that the accommodation had come to an end once several other employees filed a grievance also seeking Sundays off for religious reasons. The only point the Ninth Circuit made with regard to the Truckee accommodation appears in a footnote under the heading "Temporary Accommodation and Transfer." The opinion states:

> Finally, Opuku-Boateng proposed a temporary or trial accommodation that would have allowed the Department to experiment with the proposed accommodation and permitted both parties to investigate the possibility that Opuku-Boateng could be employed in another job in the Department or some other State agency, should the accommodation prove infeasible in practice. The district court rejected this suggestion also. We disagree. At the very least, the State should have either temporarily scheduled Opuku-Boateng not to work on the Sabbath or sought to obtain voluntary shift trades for him on a short- or long-term basis.

App. at 29.[13] The court then amplifies its conclusion in

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[13]The State's own "expert," Martina Haleamau, confirmed an accommodation was feasible. She testified it was possible to accommodate respondent "where you didn't have many people wanting to be

footnote 26, stating:

> Lozano testified that she had used three techniques to accommodate requests for time off. She (1) attempted to schedule the employee to provide the requested day off, (2) provided the employee with shifts that would afford him sufficient time to attend to his personal business, or (3) schedule the employee to work a desirable shift to enhance his ability to trade with other employees. RT 377-4 to-20. The record indicates quite clearly that temporary accommodations were possible, at least for shifts that were scheduled at a particular time. Lozano, for example, testified that she accommodated herself and two other inspectors semester-long college courses. RT 377-2 to-25. *The record also shows that a Protestant minister who needed Sunday mornings off had been accommodated for a period of 10 years.*[14]

App. 29-30 n.26 (emphasis supplied). Clearly this comment with regard to the Truckee accommodation cannot be concluded to be a *de novo* reweighing of the evidence.

Petitioner contends the Ninth Circuit ignored the district court's factual finding that accommodating Opuku-Boateng would burden other coworkers who would have to provide cover and be available for emergency assignments. Pet. at

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Sabbathkeepers at the same station and if it was a large station." RT 1212.

[14]Petitioner quibbles with the Ninth Circuit's suggestion that the accommodation was for a period of 10 years. It was the State of California, however, in its court of appeals brief that made this claim. *See* App. H *infra* at 69a. But even if the accommodation lasted only for two or three years, as now suggested by petitioner, it in no way diminishes the fact a temporary accommodation was feasible.

26. This trial court finding, App. at 62, was dealt with in the court's mandatory scheduling portion of its opinion rather than under the voluntary shift trade portion. The district court, of course, did not find that a voluntary trade would result in a discriminatory impact on coworkers.

The court of appeals, App. at 16-17, concluded the district court had too narrowly read *Hardison* so as to proscribe all differences in treatment, noting that in *Hardison* the proposed accommodation would have conflicted with the contractually-established seniority system, thus violating the employee's seniority rights under the collective bargaining agreement but denying him shift preferences. 432 U.S. at 80. The court of appeals noted that in contrast to *Hardison*, in this case the scheduling of shifts was not governed by any collective bargaining agreement, and the proposed accommodation would not have deprived any employee of any contractually-established seniority rights or privileges or indeed any contractually-established rights or privileges. App. at 17.[15]

Petitioner argues, however, that accommodating a Sabbatarian where the employer, having a neutral rotating system, operates a workplace 24 hours a day need not grant special shifts to a Sabbath worshiper. Petitioner cites several lower court decisions including *Beadle v. City of Tampa*, 42 F.3d 633, 635-37 (11th Cir.), *cert. denied*, 115 S. Ct. 2600 (1995); *Beadle v. Hillsborough County Sheriff's Dept.*, 29 F.3d 589, 592 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995); *Wisner v. Truck Central*, 784 F.2d 1571, 1572-74 (11th Cir. 1986); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 144-47 (5th Cir. 1982); *United States v. City of*

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[15]In *Hardison*, 432 U.S. at 81-82, this Court noted seniority systems are afforded special treatment under 42 U.S.C. § 2000e-2(h). *See EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991).

Albuquerque, 545 F.2d 110, 113-15 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). Pet. at 4-5. Those cases, however, are clearly distinguishable from the facts here.[16]

In each of those cases (other than *Beadle v. City of Tampa)*, voluntary trades were permitted, but the employer was asked by an employee to deny the shift and job preference of other employees solely to accommodate that employee's religious needs. In each case there was a rotating shift that arguably created a vested claim on the part of other employees for specific days off, and it was argued such an arrangement is similar in effect to the collective bargaining agreement in *Hardison* which contractually provides for scheduling on the basis of seniority. In *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), no shift trades were permitted.

Under the border inspectors' arrangement, however, each employee at Yermo had an equal right to request that the scheduler take into consideration special needs they had for their days off -- whether it be for schooling, for little league, or for religious reasons. The scheduling procedure followed in Yermo clearly created no vested claim to specific days off. *See* App. A *infra* at 4a-5a, 10a, 19a-20a.

Petitioner cites not one case that suggests when voluntary trades are generally permitted, shift trades would not be required as part of an accommodation arrangement. As the court of appeals noted, the district court read *Hardison* too narrowly, finding a discriminatory preference if other

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[16]Likewise, *Eversley v. MBank Dallas*, 843 F.2d 172 (5th Cir. 1988), cited by petitioner at page 19, is also distinguishable. There the court held "that forcing other employees, over their expressed refusal, to switch from the day shift to the night shift would be unreasonable and an undue hardship." *Id.* at 176.

employees work more Friday nights and Saturday shifts.

Here the court of appeals noted that "unlike in *Hardison*, there is no evidence that the proposed shift-scheduling arrangement would, in the end, have granted Opuku-Boateng a privilege or imposed more than a *de minimis* burden on other employees." App. at 18. In contrast, here, as the district court concluded, all employees at the Yermo station were required to work "an equal number of undesirable weekend, holiday, and night shifts." App. at 18-19.

After reviewing the full trial record, the court of appeals found that "[n]o evidence was offered that the shift arrangements could not have been arranged in a manner that would have insured that Opuku-Boateng and other employees all receive an equal number of undesirable shifts. Therefore, the State failed to carry its burden of demonstrating that Opuku-Boateng's practice of observing the Sabbath could not have been accommodated through scheduling arrangements without affording him preferential treatment." *Id.* at 19.

Finally, the court of appeals noted that respondent had himself proposed to merely use the voluntary shift trades. Because this arrangement was voluntary and a practice generally employed by the Yermo employees, there would have been no preferential treatment discriminating against coworkers. App. at 20.

The court of appeals found its conclusion to be in accord with other appellate court decisions, such as *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979). That court stated that

> finding that a proposed accommodation would entail some form of discrimination does not end the enquiry. The

> Court in *Hardison* held that differential treatment resulting from accommodation runs afoul of section 2000e-2(a)(1) if it: (1) would compromise other employees' contractual seniority rights as secured by a collective bargaining agreement; or (2) would confer a privilege, the cost of which was more than *de minimis*, solely on the basis of the recipient's religious beliefs. 432 U.S. at 81-85, 97 S. Ct. 2264. Neither of these situations is present in this case.

Id. at 962.

Permitting Opuku-Boateng, like other employees, to request days off prior to scheduling and in accordance with long-established practice at Yermo to trade with other employees once the schedule is posted would not constitute a preference solely on the basis of respondent's religious beliefs. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 n.7 (9th Cir. 1989); *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 73 n.3 and 74 n.4 (5th Cir. 1990).

The trial court made two findings with regard to voluntary trades: (1) the results of a poll indicated that none of the employees was willing to accommodate Opuku-Boateng on a permanent basis; and (2) even if employees were willing to trade with Opuku-Boateng on a permanent basis, such would violate the Department's policy of avoiding consistent scheduling patterns. App. at 63-64.

The Ninth Circuit concluded the poll was flawed, and testimony regarding the results of the poll constituted inadmissible hearsay which could not be considered by the district court. Thus, the record does not support the conclusion that Yermo station employees were unwilling to

make a reasonable accommodation. After reviewing the evidence, the court of appeals determined that "[t]he State failed to conduct the type of inquiry into the feasibility of trading shifts that would have been necessary to answer that question one way or the other, thus to enable it to carry its burden." App. at 24.[17]

The court of appeals found that "[a]lthough the Department had a legitimate interest in varying work schedules to discourage bribery and dishonesty, there is no probative evidence that suggests that accommodating Opuku-Boateng's religious beliefs would have resulted in a schedule that was so predictable . . . that it would have jeopardized the Department's security interests." App. at 26. The record is clear on this point. *See* RT 583.

II. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THE RESULTS OF THE POLL SHOULD NOT HAVE BEEN RELIED UPON.

Petitioner argues that the Ninth Circuit reevaluated the reliability of witnesses' testimony. Pet. at 27. Petitioner argues that surveys and polls can be admitted as evidence under either: (1) the hearsay exception for state of mind; (2) the general hearsay exception for otherwise trustworthy evidence, or (3) as the basis for an expert opinion. Pet. at 28 n.6.

At the trial the State attempted to introduce evidence concerning a poll it took. The record demonstrates the following with respect to that poll:

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[17] *See* a similar holding in *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448, 1455 (W.D. Mich. 1986).

(1) Ingham instructed someone at Yermo to take a verbal poll of employees to ascertain how many would be willing to trade shifts. RT 987.

(2) The closest Ingham could come to identifying when the poll was taken was within a month or so after he spoke with Herb Cohen, the Department's in-house counsel, about Opuku-Boateng's need to be off. RT 988-89. In fact, the court asked Ingham when the poll was taken, but Ingham could not remember. RT 1000-01. When Ingham was asked whether the poll was taken before or after a final decision was made on Opuku-Boateng's employment, Ingham responded, "I can't recall." RT 10005-06. Further probing, counsel asked Ingham: "Now do you have a recollection when that decision was made terminating the process to hire . . . whether the poll had been taken or not at that point?" Ingham replied: "I do not recall." RT 10009.

(3) In fact, Ingham could not even remember whether it was he or some member of his staff who may have requested the poll be taken. RT 1037-38. Ingham's deposition was read to him at the trial. It disclosed Ingham had asked Gray to take a poll. The deposition revealed Ingham received the results of the poll a week after the poll was requested. He further testified he did not know whether the employees were polled or what questions were asked. RT 1039-45. Gray testified he had no knowledge of what steps were taken by the Department concerning Opuku-Boateng. RT 907.

(4) Whitacre, Yermo's acting supervisor, testified that his first day back to work following vacation was November 6, and he did not remember hearing about Opuku-Boateng any time in October. RT 528. Whitacre recalled a poll being taken but did not remember how many were polled. He testified: "Obviously not everybody could have been

contacted." RT 537. Whitacre's deposition revealed he did not recall actually taking the poll. RT 537-38. At the trial Whitacre testified he believed there was an informal poll taken to determine whether anyone would be willing to trade shifts on a permanent basis. RT 536.

(5) Another Yermo employee, Maria Lozano, recalled that prior to October 28, when Opuku-Boateng first came to Yermo, Sandridge and supervisors Whitacre and Sholquist informed her a potential employee would not be able to work Fridays, Saturdays, and Sundays because he was a Seventh-day Adventist. RT 344, 346-48, 443. Sandridge told Lozano respondent's religion prevented him from working Fridays, Saturdays, and Sundays. Lozano spoke with other employees at Yermo. App. A *infra* at 1a-2a. Lozano said Whitacre asked her if she would be willing to trade with respondent so he could be off for religious reasons. Lozano informed Whitacre she would be willing to trade with Opuku-Boateng some of the time, but not always. RT 444-45. She also testified she believed others would be willing to swap with Opuku-Boateng. When asked about the possibility of trading, however, she had understood Opuku-Boateng required a 3-day weekend off which she considered unfair. RT 445-46, 457-58.

(6) Ingham never considered polling employees at the Meyers Inspection Station where the Department had already accommodated an employee, Renee Finney, as a seasonal employee. Counsel suggested if Ingham had relocated Opuku-Boateng to a station such as Meyers where it might have been easier to accommodate him, it would be important to know how those employees felt about trading. Ingham responded: "In retrospect, I agree with you." App. D *infra* at 50a.

The trial court, when considering the polling testimony, ruled:

> I'm admitting the evidence that a poll -- the fact that a poll was taken itself can be hearsay, but it is received of course not for the truth of what was developed. . . . I'm going to permit him to testify to what results were reported to him with the understanding that *they are not being accepted by the Court as proof of the truth of the outcome of the poll*, and the Court has to recognize that depending upon how the question is asked, the answer may be different.

RT 1003-04 (emphasis supplied). Thus, the court of appeals correctly held it improper for the trial court to find that "the informal poll taken by defendants indicated that none of the employees were [sic] willing to accommodate plaintiff on a permanent basis, . . . [and] it would have been only a matter of time before plaintiff would have been unable to find a replacement to work his designated shift." App. at 63. Undoubtedly, this error directly affected the outcome of this case.

Although petitioner suggests in spite of the trial court's correct ruling that poll results testimony could not be considered, it still contends the court of appeals was wrong in its evidentiary conclusion on this question. But none of the exceptions to the hearsay rule relied upon by petitioner permits a consideration of this poll's results for its truth. *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978), relied upon by petitioner, suggests that any poll admitted into evidence must not be unfairly worded, *id.* at 758, and must be objective, scientifically designed, and impartial. *Id.* at 759. The court in *Pittsburgh Press Club* also suggests that poll interviewers must have no interest in the litigation. *Id.* at 758.

Many courts, in determining whether to admit surveys and

polls, have looked to Judge Feinberg's scholarly and well-reasoned opinion in *Zippo Mfg. Co. v. Rogers Imports*, 216 F. Supp. 670, 682 (S.D. N.Y. 1963). He states that whether or not the survey may be accepted as trustworthy depends on whether the "questions are unfairly worded to suggest answers favorable to the party sponsoring the survey." He also states that "the same result would follow if the interviewers asked fair questions in a leading manner."

In *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D. N.Y. 1983), the court applied a strict standard in evaluating the trustworthiness of surveys, stating:

> The trustworthiness of surveys depends upon foundation evidence that (1) the "universe" was properly defined, (2) a representative sample of that universe was selected, (3) *the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported,* (6) the data was analyzed in accordance with accepted statistical principles, and (7) *objectivity of the entire process was assured.* Failure to satisfy one or more of these criteria may lead to the exclusion of the survey.

Id. at 774 (emphasis supplied). Clearly, the claimed poll ultimately relied upon by the trial court here failed at least points 3, 4, and 7, and perhaps 5. Nontheless, the court made no finding as to the trustworthiness of the poll.

Petitioner suggests that in spite of the court's ruling excluding the poll results testimony, nevertheless it could be considered because it was testified to by an expert. It was not

admissible through Ingham's testimony because his testimony was dominated by his reliance on information excluded for reasons that bear on the reliability of the poll's results. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1981). Also, as the court stated in *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958), "it is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable." Clearly here the court made no such finding and specifically held that the results of the poll could not be considered. For the above reasons, the court of appeals' pivotal ruling concerning the trial court's consideration of the poll results is not subject to challenge.

III. THE RELIGIOUS ACCOMMODATION REQUIRED BY THE NINTH CIRCUIT IN THIS CASE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OR THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner raises both the Establishment Clause and Tenth Amendment defenses for the first time before this Court. Such defenses were not raised at the trial nor in the court of appeals even though the relief granted by the court of appeals was precisely the relief requested in the trial court by respondent. Furthermore, petitioner cites no authority for its Tenth Amendment argument. Petitioner's arguments for both of its constitutional assertions are nearly identical.

As the Ninth Circuit observed, coworkers would not be burdened by available accommodations -- principally voluntary trades. Thus, using the accommodation process for Opuku-

Boateng would not threaten the workplace morale.[18] This workplace morale argument is disingenuous in light of petitioner's statement in its Post-Trial Brief: "At no time has defendant suggested that the 'morale' of the Yermo station would inevitably suffer if plaintiff were to be accommodated." App. G *infra* at 68a. Petitioner's bold assertion that accommodating respondent would undermine the State's policy of having unpredictable shifts to avoid collusion is without merit. All that was required under the policy was there be some change from time-to-time so that truckers did not become too acquainted with the inspectors. RT 583, 1096.

Equally without merit is petitioner's claim that accommodating respondent would require the State to change the way it schedules shifts. The court of appeals only suggested that in the Department's initial "investigation of the feasibility of an accommodation" the Department could have,

> for example, first determined the total number of Sabbath shifts Opuku-Boateng would be assigned over the forthcoming year as well as the projected schedules for that period of the other employees. Then by asking the individuals polled how many specific shifts they would be willing to trade . . ., the State could have determined whether the other employees . . . would collectively have been willing to make the necessary accommodation.

App. at 24 n.22.

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[18]The Civil Rights Act was drafted to protect the discrete and sometimes unpopular rights of individuals against the potentially oppressive mood of the majority. 42 U.S.C. § 2000e(j) is one example of that important purpose. *See Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 400-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

Finally, petitioner's argument that the Ninth Circuit requires "that respondent be transferred to some other job in State service if his temporary accommodation . . . fails" is incorrect. Pet. at 23. Also incorrect is petitioner's assertion that a transfer would violate State Civil Service requirements. *Id.* at 23-24. What the Ninth Circuit suggested was that a temporary accommodation "would have . . . permitted both parties to investigate the possibility" of other state employment. App. at 29-30.

Petitioner overstates the court of appeals' holding in its attempt to make that court's decision appear unconstitutional. The court of appeals did not order petitioner to transfer respondent to some other job in state service contrary to the State civil service requirements, as suggested by petitioner. Pet. at 23-24.

The plant quarantine inspector position was an entry level position, and it is not unusual for employees in this classification to transfer to other Department positions. App. C *infra* at 32a. There is uncontradicted testimony from one of the State's witnesses that once Opuku-Boateng had completed probation, he could have transferred to a position such as an agricultural biologist or a grain and commodity inspector without taking an examination under the civil service rules because the transfer would be to a position in a class within 10% of his salary and responsibility level. *Id.* at 31a-32a. In fact, "[t]here are a variety of things that you can do for a permanent employee" to accommodate his/her religious requirements to be off work certain days. *Id.* at 27a-32a.

What the Ninth Circuit's decision requires in this case is that respondent be provided the same opportunities for accommodation as are generally available to all other employees employed as plant quarantine inspectors for the

State of California. They are: to give equal consideration to his request for days off prior to scheduling, to take into consideration his religious needs in the scheduling process so as to enhance his ability to trade with other employees, to permit him to engage in voluntary trades with other employees, and to provide the same consideration for a transfer to another position as is available to all employees under the civil service rules. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986). Such accommodation requirements do not advance religion. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 616-18 (1987) (Scalia, J., dissenting); *Gillette V. United States*, 401 U.S. 437, 454 (1971); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 646 F.2d 445, 455 (7th Cir. 1981).

CONCLUSION

For all the foregoing reasons, the State of California's Petition for Writ of Certiorari should be denied.

Dated: April 14, 1997

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APPENDIX

APPENDIX A

REPORTER'S TRANSCRIPT ON APPEAL

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Maria Lozano
Direct Examination by Mr. Boothby

[p. 373]

Q I don't remember exactly where we left off, but I think we were talking yesterday about a conversation, for instance, that you had with Mr. Sandridge. Did you also talk to other employees about what Mr. Sandridge had told you about Mr. Boateng coming and that he was -- because of his religious concerns was not able to work Friday, Saturday, and Sunday? Did you talk to other employees about that?

A Yes, sir.

Q Was that conversation before Mr. Boateng came to the station?

A Yes, sir.

Q All right. At any point in time that You can recall, did anyone in management or in supervision with the department say anything to you concerning the fact that there might be a duty to accommodate the religious needs of employees?

A Um, Mr. Whitacre asked me if I would be willing to trade Mr. Boateng.

Q Okay. Did he tell you that there was some federal or state requirement to look at that as a possibility?

A No, sir.

[p. 374]

Q And as I understand it, you were under the impression at the time that we were talking about three days; is that true?

A Uh, yes, sir.

Q Let's talk a little bit about trades. Did you ever -- were you ever involved in trading with other employees to either accommodate your own needs to be off or to accommodate another employees needs to be off?

A Yes, sir.

Q And can you give me illustration of the kind of events or concerns or interests that would cause you for your purposes, to trade?

A Um, I have nephews who play baseball, so sometimes if I'm working a swing shift I'll ask someone who's working a day shift or 10:00 to 6:00 to trade so I can attend their game.

Q All right. Any other reasons?.

A Um, I've traded sometimes so I can attend a medical appointment that I wasn't able to give my supervisor pre -- or my station manager pre-advance warning, because normally I try and schedule my medical appointments on my days off; but sometimes I can't, so if it turns out that I can't, then I -- if it's in the morning I'll try and trade for a swing shift so I can go in the morning and work at night.

[p. 375]

Q How do you go about doing that? Let's say that you want to be off in order to go attend a baseball game -- your nephew, is it?

A Yes, sir.

Q How do you go about doing that? Do you look at the schedule and find out somebody that might not be working at that time?

A No, sir, I look at the schedule to see who's working and, um, then I'll just ask them. I'll say whoever it is, I'll say "could you trade me because I'd like to go to my nephew's baseball game, and if you ever need a trade then later I'll trade you if I can."

Q How long -- how often would this occur that you would -- not just for a baseball game, but trade for any purposes, let's say, within the course of a month?

A Maybe once, maybe never.

Q All right. Did you ever accommodate some other employees who wanted to be off?

A Yes sir.

Q And would you normally agree to a trade if another employee asked you if it did not conflict, with something that you had planned?

A Yes, sir.

Q Did you normally find other employees to accommodate your needs when they didn't have something [p. 376] that they were committed to?

A Yes, sir.

Q Did you find that there was generally a spirit amongst the employees at Yermo to accommodate one another's scheduling' needs and to trade as best they could?

A Sometimes.

Q Were there certain people that were more accommodating than others?

A Yes.

Q All right. Would you tend to go to the people that were more accommodating?

A Yes, sir.

Q If Mr. Boateng had been, employed there, would you have treated him the same as any other employee in considering his needs for trade?

A Yes, sir.

Q All right. Nov are you aware of any inspectors at the Yermo station that have gone to school while being employed there?

A Yes, sir.

Q And how would that be -- now you've done scheduling?

A Yes, sir.

Q All right. Have you scheduled people to be [p. 377] off for school purposes?

A Um, no, not normally.

Q Have you done it at all?

A Um, what you do, I've given them time off for school but, you know, as the schedule -- like they have to have -- if we're talking about rank and file, they have to have

two days off in a seven-day work week. So if it works out -- if the schedule works out that there's people, there's plenty of people, then I'll try and give them a day off that has their school; but if not, I'll try to give them a shift where they can go or possibly there's enough people where they can trade someone.

Q So you look at really three factors. You look at giving them a day off, and if that doesn't work out, giving them a shift that would give them that window of time that's necessary for the school, or the third possibility is giving them a shift that perhaps enhances their ability. to trade?

A That's correct, sir.

Q Who have you done that for?

A Um, I've done that for Deedee Day, I've done that for myself because I go to school, I've done that for Sonia Minios. That's all who I can think of right now, sir.

[p. 378]

Q All right. You indicated that you've done it for yourself, that you have worked out an arrangement so you could go to school; is that true?

A Yes, sir.

Q What are we talking about, college?

A Yes, sir.

Q And so are we talking about at least one or two days a week that you have at least a period of time that you have to be or you should be or supposed to be at school on a regular basis?

A The way I go to school right now, I go to school on Tuesdays and Thursdays, evenings --

Q All right.

A -- from 7:00 to 9:50.

Q How do you work out -- make certain, or at least attempting to make certain, that you're going to be off so that you can attend school on a regular basis at those times?

A Um, well, see, I'm not on a 40-hour work week.

Q All right.

A Okay. So my schedule says that I can be off anywhere from a day -- or excuse me, I can work anywhere from a day to 18 days straight, but -- and depending on how many Saturdays and Sundays there are in the month and depending if there's any holidays in the month, [p. 379] those are the days off that I have. So I either work day shifts or I'll work graveyards, or if I work swing shift I'll schedule myself so possibly I can trade with somebody.

Q All right. Now you indicated that of course there's Saturday and Sunday and there's holidays?

A Yes, sir.

Q And as I understand it, am I correct that at least the other inspectors have a 40-hour work week and that recognizes that there's a five-day week, and they also get off a holiday if there's a holiday that falls in a month; is that true?

A That's correct, sir.

Q Okay. Now because you're in school, do you tend to give up your Saturdays and Sundays and holiday in order to be able to attend school as part of your scheduling arrangement?

A Um, I try to.

Q So maybe Saturday and Sunday is preferred by some, but because of your schooling you might prefer to be off on whatever day your school on; is that correct?

A Um, not all the time.

Q Not all the time; some of the time?

A Sometimes yes, sometimes no.

[p. 380]

Q Okay. Now with reference to Deedee Day --

A Yes, sir.

Q -- now she's a regular 40-hour employee, is she not?

A Yes, sir.

Q All right. She would be working the same schedule as the other inspectors, being rotated in the various shifts just like any other inspector; is that true?

A Yes, sir.

Q How long has she been attending school?

A Um, I'm not really certain. I know that she was going to school when she was working at Long Valley inspection station, and I know that she's going to school now.

Q Is she pursuing -- to your knowledge, is she pursuing a degree in psychology?

A Yes, sir, that's correct.

Q And do you know what school she attends?

A She's going to Cal State San Bernadino.

Q So she would have to travel from Yermo to San Bernadino to go to college; is that true?

A Yes, sir.

Q Do you know how many days a week?

A No, sir, I don't at this time.

[p. 381]

Q Do you know if it's more than one day a week?

A I believe so.

Q And although it may change from semester to semester, would there be certain days that she needs off in order to do that?

A Um, I don't know. I guess.

Q Well, is that the way that she -- her schedule has been changed by the three methods that you've suggested in the scheduling process?

A Yes, that's normally the way I would try and schedule her.

Q And you've done that, have you not?

A Yes, sir.

Q And to your knowledge, has she attended college?

A Yes, sir.

Q All right. Do you know how many years it's been that you have known of her attending college? Can you quantify it in years?

A Um, not really. I know she went to school at Long Valley.

Q When was that?

A She came back to Yermo last year, I believe, and then prior to that she was coming from Long Valley, so I know she went to school in Long Valley.

[p. 382]

Q Is she still going to school?

A Yes, sir.

Q And she's still being accommodated in that fashion; is that true?

A Yes, sir.

Q Okay. Do you know a Ben Blinko?

A Yes, sir.

Q Has he attended school also by this type of arrangement?

A I can only assume he has, sir. I don't know.

Q Well, I don't want you to assume. Do you have knowledge that --

A I know he's gone to school, yes, sir.

Q How about Wayne Laslow?

A Leslie. Yes, I know he's going to school, sir.

Q Has he been accommodated in that same fashion, to your knowledge?

A I believe so, yes, sir.

Q Are there people that are permanent employees, permanent hires, at Yermo?

A Yes, sir.

Q Now as I understand your testimony -- let's take you, for instance. You would attempt to get -- would you attempt to get your request in -- when somebody else was doing the scheduling, would you [p. 383] attempt to get your request in at a certain time?

A Yes, sir.

Q And as I understand it, it's so many days prior to the posting of the schedule; is that correct?

A Yes, sir. The schedule -- your requests have to be in by the 29th of each month.

Q Prior to the schedule -- the posting?

A Yes, sir.

Q Okay. And the posting is supposed to be on the 15th of the month prior to when the schedule takes effect; is that true?

A That is correct, sir.

Q Now are there times when the schedule has already been posted and so the time in which you have to get your request in has already passed when you find that you need or want to be off for some reason?

A Yes, sir.

Q Have you ever made a request -- I'm not talking about a trade yet, but a request for a scheduling change after the time has come and gone to put your request in?

A Are you asking me if I've ever come to a point where it's past the time to hand in the note and I need to be off for something?

Q Yes.

[p. 384]

A Yes, that's happened to me before, sir.

Q Have you gone to the person who's doing the scheduling and asked if they can make an adjustment?

A No, normally I'll wait to see how the schedule turns out and then go from there and see if I can trade around.

Q All right. So you normally do that by trade?

A Yes, sir.

Q Okay. Are there certain days of the week that based upon your -- what is it, eleven years now experience there?

A Twelve and a half.

Q Twelve and a half years. Based upon your twelve and a half years of experience at Yermo, are there certain days that you have found are fairly consistently heavier than other days?

A Yes, sir.

Q And what days are those?

A Um, Fridays, Saturdays, Sundays, and Mondays; and then sometimes the middle of the week, Wednesday.

Q All right. Now in your deposition you ranked those for me. Can you rank those for me?

A Um, Sunday is one, Friday is two, Saturday and Sunday would be probably tied for third, and then Wednesday could be tied for third, too; just depends.

[p. 385]

Q I thought you told me Sunday was one.

A Sunday was number one, yes, sir. That's what I said, sir.

Q All right. And Friday is two?

A Yes, sir.

Q Now what's tied with Saturday?

A Saturday, Monday, and Wednesday can all tie.

Q Saturday, Sunday, and Monday are about the same?

A No, Saturday, Monday, and Wednesday, sir.

Q Okay. I'm sorry. When you say -- when you rank them one, two, three, and whatever, are you saying that Sunday, based upon your experience, is the busiest day?

A Yes, sir.

Q And Friday is the next busiest day?

A Yes, sir.

Q And then Monday, Saturday, and Wednesday, they tend to be, give or take changes, I suppose, the next busiest days?

A Yes, sir.

Q All right. And then I suppose the remaining days of the week, are they about the same or are there certain days that are the least -- is there a last on the list?

[p. 386]

A They can all be kind of busy, but they're not too bad.

Q All right. Do you know why Sunday tends to be the busiest day?

A Well, normally everybody is coming back from either going to Vegas or everybody is coming back from their trip. If they don't have to be to work Monday, then they'll probably come in on Monday. Sunday we're swamped.

Q Is that true all day long or does it start at a certain time on Sunday, based upon your experience?

A It will normally start at about anywhere from midnight to 2:00 or 3:00, or sometimes even 1:00 o'clock in the morning and the traffic starts.

Q Would the graveyard shift on Sunday then tend to be a heavy. shift?

A Yes, sir.

Q A person -- how many people work that graveyard shift normally, let's say in November?

A In November? Are you talking formerly or presently?

Q Let's take 1982.

A 1982, there would be in November, um, three people.

Q Three people. And would those three people [p. 387] generally be having to move pretty quick in order to process the cars through?

A Yes, sir.

Q All right. And then it continues on up until approximately when on Sunday?

A Well, like I said, sir, it will start sometimes anywhere from 12:00 to 1:00, and it will on -- sometimes it will stay busy until almost noon Monday.

Q I see. Now Friday, you indicated that was the next busiest; is that because when that's when people are going?

A That's when people are coming into the state.

Q Coming into the state?

A Coming into the state.

Q On Friday?

A Yes, sir. They're coming from Las Vegas or from many points from the Midwest to East coast they're coming in, but the greatest exodus is from Nevada. All the Nevada people seem to come in on Friday.

Q Is that right?

A Yeah.

Q When does that start?

A That will normally start -- it starts normally like about 4:00 or 5:00 o'clock in the morning with people coming in for work and it goes on from there.

[p. 388]

Q On Friday morning?

A Yes, sir.

Q So the person that would be on graveyard even on Friday morning would have a fairly busy time; is that true?

A Yes, sir.

Q Now do you know why Saturday tends not to be as busy a day as Sunday or Friday or perhaps ranking with Monday?

A Um, it depends. If there's a holiday, like say if Christmas is on Sunday or if some other holiday is on Sunday, then most people then will rush by Saturday because if they have to get to Los Angeles or any place in the south, in Southern California, they would almost have to be -- like say if it's some type of event, even like Super Bowl, okay, they would almost have to be in our station by at least 1:00 o'clock or 2:00 o'clock in order to make it to L.A. to see the Super Bowl because the traffic is so congested in Los Angeles or in San Diego. So it depends; Saturday can be what's left over from Friday or it could be pretty steady, but it's normally always steady; and sometimes it can be very heavy.

Q There are certain times of the year, as I understand it, that are heavier than others; is that [p. 389] true?

A Yes, sir.

Q Would that be the summertime, basically?

A Summertime, and then Thanksgiving, Christmas, Easter, spring break, Presidents' birthdays in February, Mother's Day, Father's Day, New Year's, Memorial Day, Labor Day weekend when it's Jerry Lewis Telethon in Vegas or in California, depending on where they schedule it, Super Bowl Sunday -- just depends; playoffs, World Series, just depends.

Q Let's take Thanksgiving and Christmastime.

A Yes, sir.

Q Based upon your experience, does the station manager bring in seasonal people, college students, to assist during those times?

A Um, yes, sir.

Q So you have more help during those times where you bring in college students that perhaps are off during that short vacation period and they work to augment the staff that's there, is that what happens?

A Well, we have seasonals that -- during that time that were six-month and nine-month -- nine months' employment, different to what they are now. Before --

Q Let's talk about '82.

A Okay. In '82 there were six-month and [p. 390] nine-month seasonals, they were called TAUs, and there were overlapping TAUs. So for Thanksgiving you'd probably have, depending on how many was allowed to you from the department, we'd have maybe two, maybe three maybe four, depending, and they would be working in that time, but they'd work during the whole month, so, um -- see, now they're ATWs; they're called "as time worked," so they're only scheduled -- they're scheduled a lot differently from what they were back then.

Q Let me ask you this, in '82, just so that I'm sure what you're saying, during the Christmas recess time when you had heavier traffic and during the Thanksgiving time when you had heavier traffic, did you have -- whatever you called them, but this extra help come in during those periods of time?

A They would be scheduled to work, yes, sir.

Q All right. So even though you had heavier traffic, you had more help?

A That would be the norm.

Q And that's also true during the summertime?

A Yes, sir.

Q I'd like. to have you just tell me a few things about the schedule. If you would turn with me to Exhibit 24, and what I want to do is to look at your scheduling on some of the these days and have you tell [p. 391] me if you would, what it means. For instance, Exhibit 24, if you will look at 4/1 to 4/30/82. Do you see that?

A Yes, sir.

* * * *

[p. 393]

Q Would you turn with me over to -- it's kind of cut off, so it's 9/1 --

A Oh, I see, okay.

Q Do you see that one?

A Yes, sir.

Q All right. Now your name appears maybe a little more than half way down. Do you see that, number 12?

A Yes, sir.

Q All right. It shows, for instance -- I just want to ask you about this -- about a third of the way over, the second time that you're being -- the second block of time that you appear, under Friday it shows shift three, shift three, shift four, shift two, shift two, shift two, shift two, shift one, shift one, and shift one. Can you tell me why during a given block in time you wouldn't be continually working the same shift?

A Um, because we work rotational shifts, sir. That means that we work days, swings, graveyards. We may not work a constant -- like say, for example, of these one, two, three, four, five, six, seven, eight, nine -- of these

ten days that I was scheduled to work, that doesn't necessarily mean I'll work a block series of three shifts or a block series of two shifts or a block series of one shift. I work a rotational shift, [p. 394] so I can work a three and then they put a four to transition you over to a two so that you don't come back -- it's not so much of an early morning. But I can work threes, twos, and ones. What I can't work is a three, one, two; that's not consistent.

Q Because it would be back-to-back? .

A Um, exactly. And you have to have an eight-hour break. That's why you can't work -- that's why I couldn't work a four to a graveyard, because that's not enough time to rest. But I could work a two and then come back and work a graveyard.

Q You do notice that Mr. Street, who's number three on there, he almost consistently worked the third shift. There were some alterations, but during most of the month he worked the third shift.

A Yes, sir, but he's a supervisor, sir.

Q Is that why that would be?

A Well, maybe, because if you look at Mr. Whitacre, sometime he was broken up, but it depends on what was needed.

Q Well, look at the seventh one down, Mr. R-a-c-h -- and I'm not sure of the rest.

A Rachi.

Q Rachi, is it?

A Yes, sir.

[p. 395]

Q Now he worked the second shift during the first --

A Eight days.

Q Yeah. Now whereas yours was broken up, his isn't broken up. Was he a supervisor?

A No, he's a rank and file.

Q When the scheduler made up the schedule, was it pretty much discretionary with the scheduler whether to schedule them eight, times the same shift or to break it up like they broke yours up?

A It just depends on how -- what's needed.

Q Depends on what's needed; and who decides what's needed?

A Whoever makes the schedule out.

Q And does that depend on the various requests hat come in from the employees?

A Exactly, sir.

Q All right. I'd like to have you look at 11/2 to 12/1/82.

A Yes, sir.

Q Now as I understand it, the scheduling is based to some extent on the number of vehicles that are coming through, when there's heavier traffic or lighter traffic; is that true?

A Yes, sir.

[p. 396]

Q It looks to me like -- I may be in error, but it looks to me like at that particular time with some few exceptions you

had the same number of people on every day. You had nine people on and six people off during the majority of the time; is that true?

A Yes, sir.

[p. 397]

Q Let's take a look at March 2 to March 31, 1983. Now you notice that during more than half you had ten people on and either five or six people off, and in some instances four people off during most of the time. And you come to Saturday and Sunday you have only, as I understand, eight people on and five people off. And then on the last one you have, on Tuesday, you have eleven people on. Do you know why that would be?

A It appears like for myself that I probably would have been working had I not asked for that time off.

Q So they accommodated you, as I understand it, [p. 398] because you wanted to be off?

A Yes. My name -- it has two holiday credits. That means that I -- I can't remember back then what I had planned, but I must have asked for some time off to go someplace.

Q That was to which day now, which date?

A On Sunday and Monday.

Q 19th and 20th?

A Yes, sir.

Q And you've ranked those, at least Sunday, as the heaviest traffic day; in that not true?

A Yes, sir.

Q And they wound up with eight people?

A Yes, sir.

Q I want to ask you, what does it mean, for instance, on the 11th; you see Friday the 11th?

A Yes, sir.

Q And Saturday the 12th, and it runs on through the 15th; it shows a one and than there's a kind of diagonal line and a two. What does that mean?

A Oh, you mean on my name?

Q On yours, yes.

A It means that I traded. I was scheduled to work a day shift, and I traded with with Miss Martinez for her graveyard. I traded from the 11th to the 15th; [p. 399] I traded with her to work those graves so that I could get off early.

Q I see.

A A lot of time we do that. We trade so that we can get off on a graveyard, and that allows us to leave a day early or get all of our stuff together for whatever reason.

Q That's fairly common, isn't it, doing things like that?

A Trading, yes, sir.

* * * *

APPENDIX B

REPORTER'S TRANSCRIPT ON APPEAL
VOLUME III OF VI pp. 485-492

Elisa Martinez
Direct Examination by Mr. Boothby

[p. 485]

Q Do you recall what year it was that you became a permanent employee at Yermo?

A 1982.

Q And do you know what month?

A If I'm not mistaken, it was probably around October; September or October.

Q I'd like to have you take a look at the exhibit book that's in front of you there, and you'll notice that it's tabbed; it has tabs that indicate the various exhibit numbers. Do you see that?

A Yes.

Q Would you turn to Exhibit 24?

A Okay.

* * * *

[p. 486]

Q All right. I'd like to have you take a look, if you would, at the August 1 to August 31, '82 schedule — I'm sorry, I've got the wrong one; it's the next one, 9/1. Do you see that?

A Yes.

Q All right. Now, it looks to me, and correct me [p.487] if I'm wrong, that from the 17th of that month -- that would be the 17th of September -- through the end of that month, you were on the third shift; is that what that indicates?

A You're asking me on the 17th ?

Q Well, from the 17th on to the end of the month. You either were working on the third shift or not working at all; is that correct?

A 4:00 to midnight, the third shift.

Q Yes, I believe that would be the 4:00 to midnight.

* * * *

[p.488]

Q BY MR. BOOTHBY: Is that what that indicates, you were working the third -- or at least scheduled to work the third shift?

A Yes.

Q All right. Would you take a look at the next month, 10/1 to 11/1/82? And looking at your name, it appears to me that you were scheduled to work, except for the time that you were off, the third shift at least during most of that month up to -- and I can't really tell -- the last three or four days of that month; would that be correct?

A That's what it looks like.

Q All right. And then on the next month, 11/2 to 12 --11/2 to 12/1/82, it appears -- I'm sorry, let's take that first two months. Was there some reason that you were aware of that you were scheduled to work the third shift for that long a period of time?

[p. 489]

A I don't understand your question.

Q Well, instead of rotating to different shifts, it appears to me that during the period of time that I indicated, particularly 10/1 to 11/28, you were working continuously the same shift.

A You mean swings?

Q No, the third shift as I understand.

A Okay.

Q And my question, don't you normally rotate shifts there at Yermo?

A Yes.

Q Can you tell me why there wasn't more rotation during that month as far as your schedule was concerned

A No.

Q Now if you'll notice over on 11/2, from the 23rd to the end of the month you were again scheduled on the third shift, were you not?

A Yes.

Q And then if you'll turn the page to 12/2 to 12/31. It appears to me that from the 2nd through the 6th you were again scheduled to work the third shift; is that true?

A Yes.

Q And then that same month from the 24th through the 31st you were again scheduled to work the third [p. 490] shift; is that true?

A Yes.

Q My only question, it looks to me like during the majority of that period of time that you were working the third shift without rotating, and I'm wondering if there's an explanation for that. Do you know why that was?

A Not offhand right now.

Q Well, let me have you look at 1/1/83 to 1/31/83. And it appears to me that starting with the 24th of that month you were scheduled to work on the third shift to the end of the month; is that the way --

A Yes.

Q -- it appears?

A Yes.

Q And then if you'll turn the page to 2/1, it appears to me that during at least half of the month you were again scheduled to work the third shift continuously, is that true?

A Yes.

Q Now do you know why it is that you continued to work the same shift without rotating?

* * * *

[p.491]

THE COURT: Maybe you don't understand the question. Do you understand what he's asking you?

THE WITNESS: He's asking me why was I working swings, 4:00 to midnights, more times than, I guess, than the day shift or graveyard.

THE COURT: He said it's his understanding that employees were kind of rotated, they worked shifts --

[p. 492]

THE WITNESS: There are no set days of rotation. We're not -- you know, we're not required to work five days of swings or five days of graveyards or five days -- you know, it can change. I could work nine days of swings or I can work nine days of graveyards. There's no set patterns of how many shifts you're going to work in that month.

THE COURT: What determines how you're going to rotate or when you're going to rotate?

THE WITNESS: The schedulemaker.

THE COURT: The schedulemaker?

THE WITNESS: Yes.

* * * *

APPENDIX C

REPORTER'S TRANSCRIPT ON APPEAL
VOLUME IV OF VI pp. 863-878

Mimi Khan
Direct Examination by Mr. Boothby

* * * *

[p. 863]

Q Let's assume that this case did not involve an individual who applied for a position --

A Okay.

Q -- and was discoverd [sic] that because of his religious beliefs he couldn't work. Let's assume, for instance, Mr. Boateng had been employed there for ten years.

A Okay.

Q And he became converted to the Adventist faith, Jewish belief, or became converted to Islam or some other religion and couldn't work on a certain day. Are you saying that then that would require him to be terminated, is that what would happen?

A No. Again, as we discussed earlier, let's say that he had been employed for ten years and then took on whatever religious faith and those requirements did not allow him to be able to work out his schedule within the [p. 864] plant quarantine inspector series. He could compete for other examinations within the department

A plant quarantine inspector is only one class out of 350 classes out of 1700 positions. There's only 100 of these positions. So he could compete for other classifications,

he could transfer into other classifications if they are within 10 percent of his salary level.

There are a variety of things that you can do for permanent employees that are on board that -- whose situation may change, whereas when you're looking at a class specification and setting up the requirements, it's something that you can't work into the concept. You can't say that it's okay to schedule people around their religious holidays or around their schools or around their -- if they don't -- if they prefer not to work on their holidays, whatever the situation is, there's no way that you can make an absolute determination along that line, and that's what the class specification is all about.

We have to be able as management to schedule people, and it is so hard to schedule, you know, between rotating schedules because you don't want the same person there at the station on an on-going basis because truckers and others get to know you and you don't have [p. 865] the objectivity and you could end up with, you know, bribes being taken and letting certain trucks go, et cetera.

So for those reasons we have to switch or rotate the schedules, and so you can't work in that this person will only be our 9:00 to 5:00, this person will never work on Saturdays, and this person will never work on Sundays. It would be very, very difficult from a management perspective to do that.

Q All right. Your response was he could perhaps take another examination, move into another position. Might it also be something that you might try to see whether by trading with other employees it worked out? Wouldn't that be a possibility?

A That has been done, yes.

Q It has been done?

A Yes.

Q When was that done?

A Oh, I believe there was one employee, and I don't know the details on it, but who after working there for a while was able -- I don't know if he was a Seventh Day Adventist, I'm not sure, but because of his religious beliefs in that station they were able to temporarily accommodate him before he retired. He'd been there for many years. I don't know the details, [p. 866] but I know that there was one situation, and that situation was brought to my attention by Howard Ingham, the individual you've discussed. But given again, a one-time, individual situation versus, you know, changing the requirements and having to do that on an on-going basis for everyone would make it very impossible.

Q You say it would make it impossible, but it at least it works on a temporary basis?

A Yes, and there are two different things here. On a temporary basis there's a lot more flexibility than on a permanent, on-going basis.

* * * *

[p. 873]

Q All right. Let me ask it in another fashion. You indicated, as I understand your testimony, that if an individual came in in - good faith hoping to have a position - there was a possibility for a transfer to another position -- and in fact you gave me a concrete illustration of a person who had

been there for ten years and became a member of a certain faith, he could transfer; is that true?

A Yes.

Q All right. You also indicated that there could be a window of time to see whether he could continue to stay; is that true?

A Um-hmm.

Q Is that true?

A Yes.

Q All right. Now assuming that Mr. Boateng came there in good faith wanting to be an inspector and it was discovered during the first three months that it just didn't work out, and it not only didn't work out in Yermo but it wouldn't work out anywhere else after investigation, was there a mechanism by which he could [p. 874] look at another place to transfer to?

A Mr. Boateng could compete for any of the examinations that were being given by the department. Part of the problem that you have with the civil service system is if -- and the plant quarantine inspector exam is a good example of this -- we test very frequently, as you would think, because of the hours. Nobody wants to work the hours and have a rotating shift. So being able to score and get on a list for the plant quarantine inspector is a lot easier than if you were to compete for an agricultural biologist position.

Q Well, but, I mean --

A So if -- so for him to not have had eligibility and to come in and say "well, I applied for this but because of my religious beliefs I don't want to take this job, I want that

job over there" is unreasonable from my perspective because he has not had an opportunity to compete with all those other individuals. Those individuals have been to an examination, are on the list, and he needs to compete there, which he would have an opportunity to do.

Q Let me come back to the man who had been there for ten years.

A Okay.

Q He would still have to take an examination for [p. 875] whatever position.

A Yes.

Q -- isn't that true?

A Yes, unless it's within 10 percent of -- there is a clause that says you can transfer to a position that's within 10 percent of your salary and responsibility level if you have permanent status.

Q How long do you have to have permanent status before you can do that?

A Permanent status is after you've finished your probationary period.

Q So if he had completed one year, he could have moved on without taking an examination?

A If the class is within 10 percent and the same responsibility level. He couldn't take a supervisor job within 10 percent of his series, but he could go to another class if the supervisor in the other unit who does the interviews and selection secretary selected him.

Q Can you give me illustration of one that would be within 10 percent of the position of quarantine inspector?

A I believe the agricultural biologist is. We have had plant quarantine inspectors transfer into that classification, and as I mentioned before, the plant [p. 876] quarantine inspector isn't the popular job to have to stay in for a long duration, so we have a lot of competition as far as inspectors wanting to go into the biologist field.

Q How about grain and commodity inspector?

A Grain and commodity inspector is either at the same level or -- I think it's below. It may be below a plant quarantine inspector, but I -- I can't remember all the salaries off the top.

Q So once the person has been there for a year, they can transfer to that?

A Yes.

Q Is that a 9:00 to 5:00?

A I believe so.

Q So if Mr. Boateng -- he could have transferred to another position within the Department of Agriculture, perhaps one of these positions that we've talked about, without taking an examination?

A If he was selected, yes.

* * * *

[p. 877]

Q Now seasonals

A Yes.

Q -- you said there's not much problem, right?

A Yes, that's true.

Q Could Mr. Boateng have been at least given a [p. 878] position -- instead of not given any position at all, could he have been given a position as a seasonal for nine months?

A That's possible, but again, I don't know if they had any vacancies, what the schedule of that seasonal employee would have been, and so on, so I can't say.

Q Well, if there had been vacancies --

A Let me tell you -- put it from this perspective, a seasonal does not have to compete in an examination, and so if there are vacancies there's -- it's much easy easier to accommodate.

* * * *

APPENDIX D

REPORTER'S TRANSCRIPT ON APPEAL VOLUME V OF VI pp. 1048-1064; 1085-1092

Howard Ingham
Cross Examination by Mr. Boothby

* * * *

[p. 1048]

Q BY MR. BOOTHBY: Now if I understood your prior testimony correctly, and let me see if I can recall your testimony, I believe you indicated that you treated, as far as scheduling purposes, your permanent employees and your seasonal employees the same; is that correct?

A Yes.

Q And you expected your seasonal employees, so [1049] long as they were employed, to be available for work seven days a week, 24 hours a day?

A Yes.

Q So there was no distinction just simply because they were seasonal employees; is that correct?

A They were all basically under the same policy, same work conditions.

Q Now have you ever heard the name of Renee Finney or Renee Hopgood?

A I don't recall -- I didn't recall her before, let's say, the last two, three weeks.

Q So if she was a seasonal employee, that policy would have applied to her, too; is that true?

A Oh, yes. I retired in 1986, and I don't know whether she worked after that or during my tenure.

Q I think her testimony was that she worked -- I think it was '80, '81, and '82.

THE COURT: That's correct.

MR. GETZ: That's correct.

Q BY MR. BOOTHBY: That would have been during your tenure.

A All right. Yes.

Q Do you recall receiving any kind of a telephone call either directly or through Mr. Gray about a person needing to be off on their Sabbath or from [p. 1050] sundown Friday to sundown Saturday attributing it to a seasonal employee?

A I don't recall one.

Q It would have been policy, would it not, for the border inspection manager to have called Mr. Gray in the event there was a request for a person to be off, even a seasonal, on a regular basis?

A It would have been policy that he call that, yes.

Q And would that normally have come in to Mr. Gray?

A Or whoever was the border supervisor at that time. In 1981 I'm very doubtful that Mr. Gray was the border supervisor.

Q That would have been who, then, in '81?

A It's just too much turnover of personnel.

Q All right. If you had gotten a telephone call saying that a seasonal had applied for a position as a seasonal employee but could not work from sundown Friday to

sundown Saturday, would it have been in accordance with your policy something that you would have said you could not have permitted?

A Yes.

Q So you would have turned that down?

A Yes, based on the requirement in the job [p. 1051] description.

* * * *

[p. 1053]

Q Let me ask it in this fashion. Would it be -- based upon your understanding of scheduling, would it be possible for a three-month period for a person to be scheduled on a basis where they would not be scheduled to work from sundown Friday to sundown Saturday?

A Only if the man making the schedule was not following policy.

Q Not following what policy?

A The unit or bureau policy that all employees rotate, do not show any preferences on shifts.

Q Well, you could rotate without being scheduled to work on a Friday night or Saturday, could you not?

A I believe it was explained that -- maybe not -- part of the policy was in the interest of fairness and elimination of complaints of employees that they all work approximately the same number of weekends, which a [p. 1054] weekend includes Saturday and Sunday, the same number of holidays, the same number of graveyard shifts, evening, and day shifts as possible. And a variance of maybe five or so, say five or six in a year's time, would be acceptable, but they were taken into consideration for the following year. And that's -- part

of my policy was always to have the supervisor -- the border supervisor check the work schedules to see what you're talking about didn't exist. And I would say from my viewpoint, had it been drawn to my attention, somebody was negligent in their duty -- or the man at the station was negligent in his.

Q Okay. Now you mentioned about policy requiring that everybody get the same number of graveyard shifts. Now one could schedule a person with an equal number of graveyard shifts and still permit that person to be off from sundown Friday to sundown Saturday, could they not?

A Yes.

Q All right. So that's not the problem, is it? Let talk about the holidays. One could schedule a person so that they had an equal number of holidays off and still schedule that person to be off from sundown Friday to sundown Saturday, couldn't they?

A The problem is accommodating this person [p. 1055] having that particular day or two days a week off, not the holiday part of it or the graveyard. It's the other employees saying "he is getting favoritism that I am not getting." And to avoid complaints as we had at Truckee, the assistant director at that time said "thou shalt see that this special accommodation does not occur."

Q Yes, sir, and you put your finger right on the problem. Isn't it favoritism, that is what you were concerned with, wasn't it?

A Special treatment.

Q Special treatment. That was the real problem you were concerned about when you turned it down -- when you turned down Mr. Boateng?

A Not that he was a Seventh Day Adventist.

Q No, I didn't say that; special treatment?

A Um-hmm.

Q Okay. Now the illustration that you gave, and you've given it a few minutes ago and you gave it in response to Mr. Getz's question to you, was what happened in Truckee; isn't that true?

A To me that is data in my computer that I react to subconsciously and my --

Q Now --

A -- my job was problem avoidance.

Q Problem avoidance. Truckee presented a [p. 1056] problem for you; is that what you're saying?

A The situation at Truckee.

Q And Mr. Boateng presented a potential problem for you; is that what you're saying?

A A very similar case. And at the time of Truckee, I had definite orders from administration "thou shalt not do this."

Q Thou shall not do what?

A Accommodate, give special treatment for any reason.

Q And when you say you had special orders, where did these special orders come from?

A Mr. Allen B. Lemmon, assistant director of Plant Industry, who is now deceased.

Q Now is it -- as I understand, you were in some supervisory responsibility in Sacramento when this problem in Truckee arose; is that correct?

A I was -- had the same position as Mr. Boateng -- as what his situation occurred.

Q No, let me rephrase it because I think you misubderstood my question. When the question in Truckee arose it involved a Mr. Riseden, did it not?

A Risden.

Q Risden. What was your position with the department at that time?

[p. 1057]

A Program supervisor of border stations.

Q All right. So you were in a supervisory capacity, and my understanding was if you had known that the supervisor was accommodating or permitting Mr. Risden to be off, you would not have permitted that.

A This is correct.

Q Okay. But it did go on for quite a while, didn't it?

A Oh, yes.

Q If there was all that much problem, why wouldn't you have heard about it?

A If it ain't broke, don't fix it. But it became broke when five others wanted the same treatment.

Q I think you testified this was back in the 1970's; is that correct, the problem in Truckee?

A Yes.

Q Wasn't it back much earlier than that? Wasn't it between 1961 and 1964?

A I don't believe so, not now. I may have said that in deposition.

Q What do you remember? In fact, you did say it was during the period of '61 through '64?

A Pardon?

Q Do you remember now that in your --

A You mean in deposition?

[p. 1058]

Q Yes.

A I don't recall what I said at that time. I was trying to give you factual answers as it came to me then.

Q Well, the reason I'm asking you this question, and it becomes somewhat critical because we had some testimony from Mr. Sandridge, I believe it was, let me see -- yes, Mr. Sandridge, who indicated that he was in Truckee during the period of time from 1959 to 1963 and Mr. Risden was getting time off then by swapping with other employees. Are you saying that this went on from whatever time that was, sometime between '59 and '63 up until the Seventies without anybody having a problem?

A We're talking about two different situations.

Q Okay.

A An employee was allowed to voluntarily trade with his immediate supervisor's knowledge, and the other one you're saying it was the supervision's responsibility to provide Mr. Boateng his 24-hour period each and every week. There's a great difference between the employee soliciting it and if he couldn't find a trade, work his shift.

Q Well, but my understanding of your testimony earlier today was that if you found out people were going to trade on an on-going basis you wouldn't permit [p.

1059] that, and apparently this was done for ten years according to your testimony just now. It's okay if it's by voluntary trade; is that your testimony now?

A It didn't have my official approval.

Q Well, it may not have had your approval, but my question is it's okay as long as it's done voluntarily; is that what your testimony is today?

A No, no, I'm just saying there's a difference between an employee asking a fellow employee to voluntarily trade or insisting that management do the trading involuntarily with other employees.

Q Okay. And --

A And the willingness of the employee to work if a fellow employee refused or didn't care to trade.

Q All right. What is the difference?

A What's the difference?

Q Yes, sir.

A The shift was covered.

Q It would be covered in both situations, would it not?

A With the exception that you're disaccommodating whoever you mandatorily require trading with him.

Q We're getting back now to the issue of fairness?

A Right.

[p. 1060]

Q All right. But as long as people are willing to do it, then even though you still wouldn't have permitted it, it's different; is that what you're saying?

A It was being done at a level that I was unaware of.

Q Well, if --

A And I did not approve of on-going trading --

Q Why was that?

A -- indefinitely.

Q Why was that?

THE COURT: By on-going, you mean indefinitely, long-term --

THE WITNESS: Yeah.

THE COURT: -- rather than one or two days?

THE WITNESS: With one or two days, but every week trading or trading whenever he did not have -- was scheduled that time off.

Q BY MR. BOOTHBY: Well, why would you have been opposed to it if was for religious reasons? Apparently it didn't create any problem for ten years.

A My lack of knowledge.

Q I understand that you wouldn't permit it. Now I'm getting down -- I'm trying to find out what the -- what would have mattered, assuming that you didn't care, [p. 1061] how would it have impacted on the public business.

A The impact comes only when the others at the station create a problem, and I am the one that operated with problem avoidance in mind.

Q Yes, sir. Except we do have a problem today, don't we?

A Yes.

Q All right. Now the problem in Truckee is a different problem than we have with Mr. Boateng; isn't that true?

A I don't see it as a different one.

Q Well, the problem in Truckee, as I understand your testimony, is that Mr. Risden wanted to be off on Sunday morning so that he could go and take care of his lay ministerial responsibilities at church on Sunday morning, and at some point in time there were some Catholic ladies that said "look, I want to go to church on Sunday morning," and all of a sudden it became a hardship when six people wanted to be off at the same time for religious reasons; isn't that what happened there?

A That's exactly it, only it was men, not ladies.

Q All right. Whatever. But the problem was that there was a hardship because a lot of people wanted [p. 1062] off at the same time. It was all for the same reasons, for religious reasons; that's what happened in Truckee?

A The reasons had no bearing. It was just six people wanting time off for any reason at the same time.

Q Whatever, but that's what caused the hardship, right?

Q Yes.

Q All right.

A Made an inability to cover Sunday morning shifts at Truckee.

Q Did you have any other individual at the Yermo station that you were aware of that was seeking to be off on a regular basis from sundown Friday to sundown Saturday?

A No, not that I was aware of.

Q So what you're really saying is that based upon what happened in Truckee you were speculating that sometime in the future there might be other people that would

want to be off at the same time, creating a problem; is that basically what you're saying?

A I'm not an expert in the field of statistics, but the theory of probability tells me yes -- or I think a more recent statement would be Murphy's law; if it can happen, it will.

Q Okay. And you were avoiding Murphy's Law?

[p. 1063]

A Attempting to avoid it.

Q Now there was testimony by a person that did the scheduling or has been doing some scheduling down at Yermo, a person by the name of -- I think her name is Lozano. Are you familiar with an employee by that name?

A I met her in the hall here the other day, and I had met her previously but basically did not know the lady.

Q All right. Now she gave some testimony that as I understood, and I think was supplemented by other testimony, that an individual can get off for certain reasons if they put their request in like by the 29th of the month prior to the 15th when the schedule is completed for the following month; do you follow me?

A Yes, I follow you.

Q Is that basically what the policy was back in 1982?

A Yes. I don't recall that it had to be in writing, but when the man made up the schedule if you were having a family reunion, a birthday, whatever, a one-time occurrence, this -- if possible, without disrupting the whole work schedule -- would take place.

Q So that was in place, you could --

A That was available to all employees.

Q So people could get off not only by trades in [p. 1064] 1982, but they could also get off by a special request made to the supervisor if it was in by a certain time?

A On a one-time, individual basis.

Q One-time basis. Now she testified that she has done that for people who were going to school. She attempted to schedule them off if she got the request in. Now you're saying that's contrary to policy?

A I don't know what her policy is after I retired. I'm not aware of her doing that when I was tenure.

* * * *

[p. 1085]

Q Would you look at Exhibit No. 25. If you'll notice, Exhibit 25 starts off with some monthly schedules from Topaz, and then if you'll turn a few pages it starts with the Meyers station.

A I'm at Meyers.

Q All right. And I think the first month that's indicated in here is one that starts 6/1 to 6/30; do you see that?

A Yes.

Q Do you see Mr. Krause, K-r-a-u-s-e?

A Yes.

Q You'll notice at the end of the month starting with the 27th he is given shift one; do you see that?

A Yes.

Q And shift, one according to the upper left-hand corner, would be 11:00 p.m. to 7:00 a.m.; is that correct?

A That's correct.

Q Is that what you would call a graveyard shift?

A Yes.

Q You notice that he works four days in June the graveyard shift; do you notice that?

A All right.

Q Would you turn over to the next page, 7/1/83 to 8/1/83. You notice that Mr. Krause starts off on the [p. 1086] first of that month working the graveyard shift and works until the 4th, and he works four days on the second shift. He's apparently off -- is that what that indicates, he was off from the 9th through the 14th?

A Are you on a different 7/1 than I am? We're still with Mr. Harms?

Q No, I'm talking about Mr. Krause.

A Excuse me, Krause. All right. Yes, I follow you now. Rephrase, please.

Q Yes. He again is working the first shift or the graveyard shift in Meyers starting with the 1st of July and works until the 4th of July on the graveyard shift?

A Yes.

Q Then he goes to the second shift, 7:00 a.m. to 3:00 p.m., for four days?

A Yes.

Q Then he's off from the 9th to the 14th?

A Yes.

Q He's back on the graveyard shift on the 17th; is that correct?

A Yes.

Q And he worked the graveyard shift until the 27th; is that what it shows?

A It's what it shows.

* * * *

[p. 1088]

Q Let me have you look at another one here, if you would, Mr. Frank. You notice Mr. Frank on the July schedule?

A I'm there.

Q He seems to work the third shift, 3:00 p.m. to 11:00 p.m., the whole month of July; do you see that?

A Yes.

Q That wasn't consistent with your policy, was it?

A No.

Q You notice here R.A. Jone, J-o-n-e, during most of that month he worked the second shift, didn't he?

A July, he did, yes.

Q So all the stations didn't really rotate on a monthly basis? I mean, within the month they didn't always rotate all their employees, did they?

THE COURT: I'm sorry, that exhibit number again was what?

MR. BOOTHBY: 26, your Honor.

THE COURT: 26.

Q BY MR. BOOTHBY: All of the employees within each border station didn't rotate every month, did they?

A This is very obvious, and you also asked -- or I told you that Mr. Mitchell had problems at this time, [p. 1089] and my recollection is coming that this was one of the reasons.

Q Okay. What problems, other than Mr. Miller having problems? I assume that's because he didn't follow your orders; is that --

A Follow the instructions.

Q Follow your instructions?

A Not mine, the instructions from the operating guide at that time.

Q Well, I thought we covered that before the break that there wasn't anything in the operating instructions concerning rotating within a month.

A There are not in those that you showed me. These were revised 1990.

Q Let me ask you about -- not about Mr. Miller, but when they weren't rotating there at that station, Meyers, what problem arose there other than the fact that you had problems with Mr. Miller?

A The U.S. Highway 50 is not a commercial truck road, and I have to honestly say -- I could not say there would be a high probability of any collusion among employees and truckdrivers.

Q Did you ever give any consideration to moving Mr. Boateng to a station like the Meyers station where maybe there wasn't as much of a need to do the type of [p. 1090] rotation that you indicated was necessary?

A Because this went on doesn't mean that I felt that way about it.

Q I know how you might have felt because you had those directives, but I'm talking about a practical solution to a problem. If there wasn't a real problem with collusion, did you give any consideration to moving Mr. Boateng there where it might be a bit easier to work?

A When you run an organization, especially a law enforcement-type agency, lack of uniformity is the first premise for problem.

* * * *

Q I want to ask you a little bit about the traffic situation. You indicated the traffic was heaviest on the weekends, and I think you said Saturday and Sunday; is that correct?

A In most cases, yes, and holidays.

Q When you say "most cases," what do you mean by that?

A There's always exceptions to the rule. [p. 1091] Airplane show at the field there, and Reno attracts thousands of people, and if that happens during the week, that generated the traffic. Or the same thing could be true in Las Vegas or Phoenix, Arizona.

Q Isn't it true that there are some stations where there really isn't any increase on the weekend as compared to the rest of the week?

A I would say no, when you say "any increase,"

Q All right.

A Maybe relatively insignificant compared to the major, but I can't honestly say there would be no increase.

Q All right. But the increase would not be a substantial factor; could we say it that way?

A Very possible, yes.

Q All right. Well, in looking at a means to accommodate Mr. Boateng, wouldn't you want to look at a station where not only -- where you don't have the problem of

commercial traffic, but perhaps looking at a station where there isn't this major increase on the weekends?

A It reduces the number of employees that the man has available to trade, it increases the possibility of those that are available of being either on vacation, sick or not wanting to trade for family reasons.

[p. 1092]

Q Let's talk about that. Now there has been testimony about polling the people at Yermo. Did you ever think about polling anybody at maybe Meyers, where they already accommodated somebody? Did you ever think about polling those people?

A No, I didn't have the problem at Meyers.

Q But if you moved Mr. Boateng to another place where it might be easier to accommodate, then you might want to know what those employees thought about trading with Mr. Boateng; wouldn't that be an important question?

A In retrospect, I agree with you. At the time I was overworked, I was opening up the stations, had capital outlay problems, we were hiring 60-some people, spreading our permanent inspectors out as thin as we could to train the new people. I could kind of look back and say "hey, Howard I'm -- I marvel that you took this amount time." But I did feel it was important, so you could yes, say what you're saying, why didn't I.

* * * *

APPENDIX E

REPORTER'S TRANSCRIPT ON APPEAL

VOLUME V OF VI pp. 1135-1147, 1168-1176

Martina Haleamau
Direct Examination by Mr. Getz

[p. 1135]

* * * *

Q It mentions -- and I'm looking at Exhibit M, the first chart -- it mentions M-1's period is 5/1 through 5/31, Yermo. Can you explain what that is, what that references to?

[p. 1136]

A That is for the month of May, May 1st to May 31st.

* * * *

Q So all three of these refer to the same period of time and the same border stations?

A Yes.

* * * *

[p. 1140]

Q Now this schedule was -- this, you say, is 5/1 to 5/31; what year was that?

A We based the schedule on 1982.

Q So if one were to look at the 1982 schedule for Yermo, you would expect to see that schedule in existence with the exception that there would be names [p. 1141] under plant quarantine inspector, station supervisor, et cetera?

A Yes.

THE COURT: I'm sorry, this Exhibit M, as well as N and O, are intended to speak as of 1982?

MR. GETZ: That's correct.

THE COURT: And the date that -- the witness said she believed the charts were made in 1985. So does that mean that she went back and made them in 1985 but used data from 1982?

MR. GETZ: Absolutely correct, your Honor. That's the next area, in fact. I'll refer the Court and witness, if you look in your book to Exhibit 24.

THE COURT: I thought you anticipated an objection from Mr. Boothby on the grounds that you were using data that existed for 1985 and '86 when we were dealing with 1982.

MR. GETZ: I misspoke. What I meant to say was that this examination was performed -- or inspection or whatever you want to call it -- was performed by Ms. Haleamau in 1985 or '86 and not 1982.

THE COURT: So there might be an objection.

MR. BOOTHBY: Well, I'm just -- I'm really confused. Now if I can -- I don't want to interrupt anything, but I'm looking at 24. Exhibit No. 24, 5/1 to [p. 1142] 5/31/82, and it seems to me that this does not match the chart. I'm confused.

For instance, down at the bottom it shows on my chart, numbers on duty on the 1st, nine, and five off. That shows ten on and five off. The next one shows nine on and five off, and there it shows -- I'm having problems, your Honor.

THE WITNESS: Yes, you're right. According to what is in this book, it's different from what is shown on the chart there. When we made this, I had taken the 19 -- the 5/31. 1982 schedule and basically kept it the same. Now you have to excuse me because this is what, seven or eight years ago that

we did this, and some of the little details now are forgotten. But we tried to keep it exactly the same. In some instances we took the liberty to change -- for example, some of the vacation days, we took the liberty to change it. We tried to show that there were -- I tried to show that there were as many people working as possible.

MR. BOOTHBY: But you didn't, though, did you? Weren't there 16 people listed on here?

THE WITNESS: One is a seasonal. We're not showing the seasonal there.

MR. BOOTHBY: Why not, if it was for May?

THE WITNESS: We were talking about permanent [p. 1143] employees and not seasonal employees.

* * * *

[p. 1144]

THE COURT: I let you break in and ask some questions so you understood what she's doing, but you can't go back and forth. Now I want to find out what this is about, and then the whole thing may go out if you believe that it should and if I agree with you. [p. 1145] It's just that simple. But I don't understand it yet.

Now I want Mr. Getz to develop, if you will please, so that I understand why there are changes made on Exhibits M, N, and O from what the original counterparts were that were made out at the time and, if so, why changes were made.

MR. GETZ: That's exactly what I was going to bring out, you Honor. I appreciate that.

Q Ms. Haleamau, the chart that you prepared was for purposes of illustrating certain issues; is that correct?

A Yes.

Q Now it was based on information from Yermo in 1982?

A Yes.

Q You've already testified there were certain changes you made. Could you explain why those changes were made?

A Yes.

Q Okay. Would you please?

A Oh, explain why the changes were made, yes.

THE COURT: First of all, what the changes are and why they were made.

THE WITNESS: Okay. In doing those illustrations we want to show that all the inspectors [p. 1146] were working. I also want to show that we were trying to equalize -- always equalize the numbers of day shift, swing shift, and graveyard shifts would be approximately the same for everyone. I was also trying to demonstrate that every employee was able to have at least four days off in a row once during the month.

THE COURT: Now I'm lost. I assumed that exhibit -- I'm just working with M; that's enough right now. Exhibit M purports to show what actually happened in 1982; apparently that isn't true.

MR. GETZ: No, I don't think it was represented as that. I think what was represented, it was based on information from 1982. There's a distinction. The distinction is for purposes of illustrating what happens when a person has to be accommodated. What Ms. Haleamau did with this exhibit was base it on actual 1982 information to make it, you know, not entirely hypothetical.

THE COURT: What do you mean "base it on 1982 information"?

MR. GETZ: Meaning, you Honor, that she picked the May 1982 Yermo schedule as the model, but she did not -- for purposes of illustration she did not follow each and every entry in the May 1982.

THE COURT: But then what's the purpose of the [p. 1147] exhibit if it doesn't follow what happened?

MR. GETZ: Your Honor, the purpose of the exhibit is to show as a matter of scheduling these are the goals of the department.

* * * *

Cross Examination by Mr. Boothby

[p. 1168]

Q 24, I'm sorry. Do you find Exhibit 24?

A Do you want me to look at it from 1982?

Q Well, let's just start with the very first month, January.

A Okay.

Q Okay. Now does that show you that you always have more people on on the weekend in January of 1982?

A You're going to have to give me a little time. I haven't seen these in a long time.

Q Sure. While you're doing that, would you look at -- let's take the first six months, and look at those.

A Now what I'm doing is looking at Saturdays and Sundays?

Q Would you compare those with the other days?

A Pardon me?

Q You're going to have to compare that with the other days.

[p. 1169]

A Yes, but the focus is on Saturday. Okay.

Q Does it look to you like Yermo during -- what did you look at, the first six months.

A Yes.

Q Did it look like they had more people assigned to work on Saturday and Sunday as they did the rest of the week?

A In some cases yes, and some cases no.

Q In fact, in some cases there were less people during the weekend; isn't that true?

A On one of the other schedules, yes.

Q At least -- at Yermo, at least during that period of time, it didn't follow your pattern, did it?

A Not on these schedules.

Q Did you look -- Didn't you look at the 1982 kind of as a pattern?

A I looked back at 1982 as a reference point, but --

Q Did -- I'm sorry. Did it make any difference -- would make any difference in what you did if you didn't try to have more people on the weekends? Would it have any impact at all on what you came up with?

A Can you rephrase that, please?

Q Yes. If you didn't try to have more people on [p. 1170] the weekends, on Saturday and Sunday, would that have any impact on what you were doing there on your hypothetical chart?

A It still would have an impact.

Q Well, I assume it would, but would it change what you came up with?

A It may.

Q All right. Now you did assume, did you not, that Saturday and Sunday are the heavier days?

A Yes.

* * * *

[p. 1171]

Q Exhibit 26. It has Topaz and Meyers.

MR. GETZ: Excuse me, your Honor, I think that's Exhibit 25.

MR. BOOTHBY: I'm sorry, that's true.

THE WITNESS: Okay.

Q BY MR. BOOTHBY: Now this has a completely different kind of setup as far as numbers of inspectors and supervisory people, does it not?

A Yes.

Q Did you at any point in time attempt to determine what the impact would be accommodating an individual on a regular basis in a place like -- let's take Topaz to start with.

A No.

[p. 1172]

Q Now if you'll look with me, there's a schedule on Meyers also. Do you notice that?

A For June?

Q Yes, starting with June. Do you notice that?

A Yes.

Q And that has a few -- at least one more permanent person working at that station; is that correct, than in Topaz?

A Yes.

Q So the impact might be different there; is that true?

A Pardon?

Q The impact might be different there at that station?

A Yes.

Q All right. Now I want to have you look in the upper left-hand corner. You'll notice that there are shift numbers?

A Yes.

Q Now they have a graveyard shift that is different than at Yermo. It starts at 111:00 p.m. and ends 7:00 a.m.; is that true?

A Yes.

Q Now Mr. Boateng, if he had been at the Meyers station, he could have worked on graveyard shift on [p.1173] Saturday, could he not? He could have worked from 11:00 p.m. Saturday night to 7:00 a.m. Sunday morning; is that true?

A I don't know. I don't know when sundown is.

Q Well, Saturday night when his Sabbath stopped, could he not, at Meyers?

A Yes.

Q And he could have worked at least second shift on Friday, could he not, 7:00 a.m. to 300 p.m.? 3:00 p.m. would be before sunset, would it not?

A Yes.

Q He could work every other day of the week, could he not?

A Yes.

Q So he wouldn't have to be off -- you wouldn't have to schedule him off weekend, would he?

A But Meyers was not a consideration.

Q Why not?

A He didn't request for Meyers. I mean, Yermo was the station.

Q Yermo was the station because of what?

A That's where he --

Q That's where he was assigned?

A I'm not sure at that time if there was a vacancy at Meyers.

[p. 1174]

Q Well, do you know if anybody looked to see if there were any other stations he could have gone to?

A I was not in the program at that time.

Q So you don't know the answer?

A No, I don't.

Q So the only thing you looked at was Yermo?

A For these charts, yes.

Q Well, did you look at anything other than Yermo for any reason other than the chart for Mr. Boateng?

A I was not in the program at that --

Q So the answer is --

A -- time.

Q The only thing you did is look at the chart on the basis of Yermo and that's all this was done for?

A An illustration that I was involved in, yes.

Q Now going back to your chart then, what if Mr. Boateng said "I'd be willing to work the graveyard shift starting at 12:00 midnight on a Sunday morning to 8:00 a.m., and I'll be willing to work the short shift; I'll take the eight hours off." That's permissible, isn't it? You can have an eight-hour time span when the man's off and have him back again, can you not?

A Yeah.

Q What if he said "I'll do that as often as it's [p. 1175] necessary"? Would that have any kind of an impact if he would have worked so that he'd work two shifts on Sunday? Would that have any effect on your charting the thing out?

A Scheduling of one employee impacts other employees.

Q The question is, would it have had a lesser impact had he been willing to do that?

A If you're talking about for --

Q And I didn't say every Sunday, I said whenever necessary.

A If your talking about doing that you cannot answer that question without really looking at it and figuring it out.

Q So you don't know the answer to this question?

A Not off-hand, no.

Q What if Mr. Boateng was willing to trade with a person who was scheduled to work on Sunday? Did you consider trading?

A Not for this, no.

Q All right. And that would make it easier , would it not, if the people did it by trade?

A Of course.

* * * *

APPENDIX F

REPORTER'S TRANSCRIPT ON APPEAL

VOLUME VI OF VI pp. 1191-1200

Martina Haleamau
Continued Cross Examination by Mr. Boothby

[p. 1191]

BY MR. BOOTHBY: Okay. Would you turn to [p. 1192] Exhibit No. 24 and look at the May 1/May31 schedule.

A For 1982?

Q For 1982.

A Is this the schedule that you want me to look at?

Q Yes. Now I have a problem because my May 1, 1982 schedule seems to start with May 1 a Saturday. Did you use a 1982 calendar when you did this?

A I also noticed that, too

Q Okay.

A And I must say that this was done a long time ago. Some of the facts, I don't recall them all.

Q And in fact in May of 1992, there were actually ten Saturdays and Sundays in the pay period, were there not, instead of nine?

A In 1982?

Q Right.

A That's -- yes, that's true.

* * * *

[p. 1194]

Q Now I'd like to have you, also looking on the May 1 schedule, tell me if --

[p. 1195]

THE COURT: That's Exhibit 24?

MR BOOTHBY: Exhibit 24.

Q Can you tell me if everyone there got a four-day weekend off?

A Do you want it limited to the inspectors?

Q Yes. I assume that's what you're limiting to, are you not?

A I'll need a few minutes.

Q Well, let me have you look at the third from the bottom, number 14.

A Berder?

Q Yes.

A Okay.

Q Now he didn't get a four day weekend off, did he?

A He got four days off in a row.

Q Well, no, but you said four-day weekend; isn't that what you were striving for?

A That's what we strive for, but if you notice here sometimes you don't have a four-day weekend off in a row.

Q All right. But you had actually -- on this calendar you actually had more Saturdays and Sundays than you did on

yours. You should have had an easier time having Sundays and Sundays off four days in a row, [p. 1196] shouldn't you?

A But, sir, again, according to the schedule -- and again if you look at May 1982 you had two supervisors on vacation at the beginning of the month, and you had --

Q How about --

A -- you had someone on vacation at the latter part of the month, and so it's considering availability.

Q How about Lozano?

A Maria Lozano?

Q Did she have a four-day weekend off?

A Maria Lozano, on the first Saturday/Sunday she had a day off, the 1st and 2nd.

Q Was it a four-day weekend?

A You can consider it a four-day weekend off because after that, after Saturday/Sunday she has Tuesday/Wednesday off.

Q Let me ask you this, have you gone through all of the calendars of Exhibit 24? And I suggest to you that every one of them has somebody who didn't get a four-day weekend off. How would that be justified in light of the fact that you testified that this is what's done basically at all the stations?

MR. GETZ: Objection; it mischaracterizes the testimony. I think she testified the ideal is to try to [p. 1197] give everybody a four-day weekend, not that it was absolutely done.

THE COURT: Well, she can answer the question. Will you restate it, please?

MR. BOOTHBY: Sure.

Q My understanding is your testimony is that what you did on this chart is what you knew was done at all the stations, including Yermo, and I'm suggesting to you, and I can take -- if I could take the time, I would do it -- I would suggest to you that on every month somebody doesn't get a full weekend off, and on every month there are several people that get more than a full weekend off plus two extra days. In other words, there are people getting four-day weekends, other people are not getting four-day weekends, and some people are consistently in that pattern. And my question is why is that?

A We strive to always give everybody a four-day weekend off. Now you're talking about 1982, okay, and we strive to give everybody at least four or five days off in a row. Weekends are preferable if you can do it. If a person did not get it for that month, then definitely the following would strive to have that person have a day off -- have a weekend off. And to do that, you have to look at the month above and the month [p. 1198] after. You have three months that you're looking at at one time.

Q So really you cannot judge it with a one-month calendar, can you?

THE COURT: Judge what?

MR. BOOTHBY: Judge what is fair, what is appropriate and what is normal.

Q You have to look at more than one month , don't you?

A Yes, when you're making a schedule.

Q Let me have you look at, for instance, March of '83.

A '83?

Q March of '83.

THE COURT: That's part of Exhibit 24?

MR. BOOTHBY: Exhibit 24, yes.

THE WITNESS: Okay.

Q BY MR. BOOTHBY: Now does -- let's look at Mr. Tracy. Did he get a four-day weekend off?

A He got a Friday/Saturday off. Now do you want me -- he got four days in a row twice.

Q Yeah, but did he get a four-day weekend off?

A He got a Saturday off with that.

Q Now on your chart you made sure that everybody had a Saturday and Sunday off, did you not?

[p. 1199]

A We also spoke about ideal on that chart.

Q I understand. But my question is, did Mr. Tracy get a four-day weekend off including Saturday and Sunday?

A Not in March 1983.

Q How about Mr. McClane?

A No, he did not, but --

Q How --

A -- however, I think it qualifies a further response. I didn't know the situation of these two employees then. I didn't know if they had requested to have these specific

days off, so it's very difficult for me to say -- answer that question, truly, not knowing the situation.

Q How about Mr. McCormick?

A No, he did not.

Q How about the next one, R.L. Daniels?

A No, he did not.

Q Let's look at the next month, and you said "well, you got to look at more than one." Look at Mr. Tracy again; did he get a four-day weekend off?

A What you don't know is that at the end of the month --

Q Yes.

A -- he is off. You don't know if the following [p. 1200] month --

Q Well, let's look at the following month. It's the next page.

A No, he didn't.

Q Well, he didn't get it off two months in a row. How do you explain that?

A Sir, like I said, I cannot explain it not knowing the situation, not knowing what was happening with these employees. I don't know if they requested those specific days off.

Q Oh, and if they request days off it makes a difference?

A Yes, if you request a specific time off.

Q How about Mr. Daniels in April; did he get it off?

A According to this, no.

* * * *

APPENDIX G

DEFENDANT'S STATE OF CALIFORNIA POST-TRIAL BRIEF at p. 48

* * * *

At no time has defendant suggested that the "morale" of the Yermo station would inevitably suffer if plaintiff were accommodated.

* * * *

APPENDIX H

DEFENDANT'S STATE OF CALIFORNIA BRIEF IN THE NINTH CIRCUIT COURT OF APPEALS at p. 20, n. 18

At least one witness, Maria Lozano, testified that she also was able to swap shifts on occasion to attend religious services and meetings. (RT 433). Further, as plaintiff admits, for 10 years, a Catholic lay minister was accommodated for religious reasons until problems arose. (RT 1057-1059; 951-95). Thus, the claim that all shift swaps were for "secular reasons" is not substantiated by the record.